(32,095)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 528

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA AND J. K. DERING COAL COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. —

Petition to Set Aside Order of Interstate Commerce Commission, etc.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Plaintiff,

v.

UNITED STATES, J. K. DERING COAL COMPANY, ILLINOIS CENTRAL Railroad Company, and Southern Illinois Railway and Power Company, Defendants

BILL OF COMPLAINT—Filed April 8, 1926

To the Honorable the Judges of the United States District Court for the Eastern Division of the Northern District of Illinois, in chancery sitting:

The plaintiff, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, a Corporation of Ohio and Indiana represents to your Honorable Court the following:

I

Jurisdiction of Plaintiff.—That the plaintiff herein also designated as petitioner is a railway corporation organized and existing under the laws of the States of Ohio and Indiana and not of the State of Illinois, and owns and operates divers lines of railway within the State of Illinois, [fol. 2] and thence into and through the states of Indiana, Ohio, Michigan, Kentucky and divers other states, and is engaged as a common carrier by rail in the transportation of interstate commerce upon all of its railway and is subject to the jurisdiction of the Interstate Commerce Com-

mission of the United States; that it files this bill to challenge the lawfulness and reasonableness of all proceedings in a certain cause lately pending before the Interstate Commerce Commission of the United States, in Docket No. 15,552, J. K. Dering Coal Company against your petitioner; and praying that this Honorable Court hold and decree the same and all orders entered therein unreasonable, unlawful, without jurisdiction and void, and grant adequate appropriate relief from the force and effect thereof.

II

Jurisdiction of Defendants and Cause.—That the Illinois Central Railroad Company is a railroad corporation incorporated under the laws of the State of Illinois, and has its principal place of business and principal business office located at No. 1, Park Row in the City of Chicago, the Southern Illinois Railway and Power Company is an electric railway corporation of the State of Illinois, and has its principal place of business and business office at 72 West Adams Street in the City of Chicago, and the J. K. Dering Coal Company is a citizen of the State of Illinois; and a corporation chartered and existing under the laws of the State of Illinois and authorized to mine and sell coal, and has its principal place of business and [fol. 3] business office located at No. 332 South Michigan Avenue, in the City of Chicago; that all said three Illinois corporations are citizens and residents of the City of Chicago in the Eastern Division of the Northern District of the United States District Court of the State of Illinois; that all of said three corporations are citizens and residents of the State of Illinois, and there is a diversity of citizenship as between them and each of them, and your Petitioner, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; that this is a suit of a civil nature in equity between your Petitioner and said three corporations as the substantial parties, and the matter and sum in controversy in this suit between your Petitioner and the said three corporations named as defendants exceeds exclusive of interest and costs the sum and amount of $4,000.00.

Jurisdiction of Illinois and Interstate Commerce Commissions.—That said Illinois Central and said Southern

Illinois Railway and Power Company are each engaged in transportation in interstate commerce and subject to the jurisdiction of the Interstate Commerce Commission of the United States, but the defendant, J. K. Dering Coal Company is a private coal producing and selling corporation of the State of Illinois, not authorized by its charter to build, own, operate or maintain a railroad, or to construct, own, operate or lease railway facilities, or to lay or maintain railroad tracks upon or across public highways, or to connect the same when so laid or accessible for [fol. 4] use by the public, with the tracks of any railway, and is in no way subject to the jurisdiction of either the Interstate Commerce Commission or the Illinois Commerce Commission, except the penal and other provisions of the laws of the State of Illinois, and of the United States made for the protection of the jurisdiction of said Commissions, and to prevent interference with the administration of the Interstate Commerce law and the Public Utilities law of Illinois, to secure the safety, convenience and welfare of the people.

III

Locus in Quo Dependency of Petitioner on Coal Traffic.—That your Petitioner has a line of railway extending from the City of Cairo in Alexander County in said State of Illinois, in a northerly and northeasterly direction through the cities of Carrier Mills, Harrisburg and Eldorado in the County of Saline, thence through Mt. Carmel in the County of Wabash, thence to Danville in the County of Vermilion in said State, with lines extending from St. Louis, Missouri, crossing said railway at Paris, Illinois, thence to Indianapolis, Cincinnati, Cleveland and Detroit in the States of Indiana, Ohio and Michigan, and is crossed at Danville, Illinois, by another line of its railway extending from Peoria East to Indianapolis, Indiana, and Springfield, Ohio; that it has no railway directly extending from the cities of Harrisburg and Eldorado in the State of Illinois to the City of Chicago in the State of Illinois, and [fol. 5] the only means of reaching said City of Chicago by its rails from those points is to divert traffic from its Cairo-Danville railway aforesaid at Paris or Danville to Indianapolis, Indiana, thence over the Chicago Division to

Chicago; that from Cairo to Carrier Mills on said line of railroad, the distance is about sixty (60) miles; from Carrier Mills to Eldorado about twenty (20) miles; from Harrisburg to Eldorado between eight (8) and nine (9) miles; that said railroad was built about 1870, principally by donations and was of extremely inferior location, grades and construction, wholly inadequate to meet present day requirements and incapable of serving modern purposes of a railway necessarily operated by large locomotives and carrying long trains of cars to effect the modern requirements of economy of operation and to enable it to maintain itself financially and meet competition; that prior to 1905 it had but little traffic on said Cairo-Danville railway, but coal had been discovered and mines opened on said line of Petitioner at Harrisburg and between Harrisburg and Carrier Mills, but there had been no extensive developments of coal mining there or railway revenue therefrom; that tests were about that time then made which showed large veins of coal thereby originating a necessity for greatly increased transportation facilities not before required to carry it to market; that said railway of Petitioner was then wholly inadequate to meet that necessity, and therefore your Petitioner entered into an extensive scheme of reconstruction of said railway from Harrisburg to Eldorado to enable development of coal [fol. 6] mines along its railway and meet the requirements of the public convenience and necessity; it relocated said railway on a lower grade and straighter line from Harrisburg to Danville, reduced its grades, laid heavy rail, built strong bridges sufficient for the operation of the heaviest locomotives and trains, constructed numerous passing and storage tracks, and extensive yard gravity tracks with water and other necessary facilities for its efficient operation alone to meet the requirements of coal traffic at Harrisburg; acquired a large number of locomotives and additional coal cars and made other improvements to meet the requirements of coal traffic there at that time and subsequently developed at a cost and expense to Petitioner of approximately Twenty Millions of Dollars; that aside from the prospect of revenue from coal traffic to be developed by opening mines along its railway in said Saline County between Carrier Mills and Eldorado and tributary thereto,

none of said improvements would have been justified or required, but ruthless waste of money; that since 1905 coal mines have been opened along the rails of Petitioner at Eldorado between Eldorado and Carrier Mills and on a branch leading off westerly from Harrisburg to Harco upon which a large number of mines, approximately fifteen have been opened producing a very large tonnage of coal which is the principal source of revenue to petitioner and without which said railway would be operated at a heavy loss; that the market for said coal is principally, Chicago, and coal sold to and consumed by the Petitioner [fol. 7] and its associated lines in the operation of their railways; that not more than five per cent of the coal produced on its railway has been sold locally in the State of Illinois, and the greater proportion thereof, approximately seventy five to eighty per cent thereof, has been shipped to the Chicago market and points beyond over the line of Petitioner to Danville and thence over lines of the Chicago and Eastern Illinois railway, and later the railway of The New York Central Railroad Company's interstate line to Chicago; that the passenger and freight business on the railway of Petitioner aside from coal traffic between Danville and Cairo is in amount insignificant in comparison with the capitalization made necessary by the coal traffic which has been developed along the line of Petitioner in Saline County; and if deprived of the benefit of such traffic the operation of said railway would be at a heavy loss; that the development of the automobile motor bus business and truck transportation has taken from the Petitioner substantially all local passenger business and a very large part of the local freight business, and with the opening of parallel hard surfaced highways threatens to further deplete the same practically to the point of total loss to petitioner, and this line of the Petitioner is almost wholly dependent upon the coal traffic of Saline County for any net revenue; that when said railroad was reconstructed from Harrisburg to Danville the traffic thereon was not sufficient to justify like reconstruction by change of grades and straightening the line and reconstruction of [fol. 8] bridges which the prospective coal traffic from Harrisburg more than justified.

IV.

Influx of Population and Construction of S. I. R. & P. Co. Railway.—That the development of coal mines along the line of Petitioner's railroad from Carrier Mills to Harrisburg after it was reconstructed caused a large influx of population at various mines and stations located between those points, and a general increase of business and financial prosperity of that territory to an extent that soon thereafter the defendant, the Southern Illinois Railway and Power Company located and constructed an interurban electric railway from Carrier Mills through Harrisburg to Eldorado adjacent and parallel on the west side of the right of way of your Petitioner to furnish frequent local passenger transportation facilities between those points and facilitate and accommodate the travel to and from said mines to and from Carrier Mills, Harrisburg and Eldorado; that said interurban railroad has been operated since its construction by said defendant and its predecessors almost exclusively for the transportation of passengers, express and L. C. L. freight and the occasional movement of carload freight, but no regular transportation of carload freight has developed on said line and the business which it was transacting when the Transportation Act of 1920 became effective was exclusively instrastate; that the Southern Illinois Railway and Power Company occupies the streets and public places of the City of Eldorado in the said [fol. 9] County of Saline and State of Illinois by virtue of a certain ordinance bearing date October 15, 1913, and verified by Samuel W. Latham, Mayor of said City, and R. S. Martin, Clerk of said City, under the seal thereof; that the said ordinance so limits the use of said tracks that no coal may be transported or hauled on said railway within said city between the hours of 10:00 o'clock p. m., and 6:00 o'clock a. m., in the night time, and that the same cannot be operated by steam locomotive power, a copy of which said ordinance for greater certainty is hereto annexed and made a part hereof as Exhibit "No. 1"; that said railway has a physical connection with the railway of the Illinois Central at Harrisburg and your Petitioner is informed and believes there is some sort of limited exchange agreement or practice between said railway and the Illinois Central for the transportation of carload freight from the Illinois Central to and from various local

points on the railway of the said defendant; that your Petitioner is informed and believes and states the fact to be that since the development of automobile, truck and bus transportation and the construction of hard roads during the last three years said defendant has had greatly reduced revenues from its railway operation, and in consequence thereof contemplates and is endeavoring to effect a general interchange of freight business and it has for sometime been endeavoring to make an exchange and division of freight agreement with the Illinois Central Company and the Louisville and Nashville [fol. 10] Railway Company on coal traffic which it hopes to develop along its railway and take from the mines located on the railway of your Petitioner between Eldorado and Carrier Mills.

V

Extent and Capacity of Illinois Central.—That the Illinois Central is a railway company owning extensive lines of railway extending from the City of Chicago into every section of the State of Illinois and into the States of Iowa, Wisconsin, Michigan, Minnesota, Nebraska, North Dakota, Missouri, Kentucky, Tennessee, Alabama, Mississippi, Louisiana, Indiana and Ohio; that no other railway located in the State of Illinois has such general distribution of its lines throughout the State or such extensive connections with other railways extending throughout the United States as the Illinois Central; that one of the lines of the Illinois Central extends from St. Louis in the State of Missouri through Belleville, Pinckneyville, DuQuoin and Benton to Eldorado in the County of Saline, State of Illinois; that said line was built about fifty years ago and is the principal outlet for coal traffic from Eldorado, West Frankford, Herrin, Christopher, Benton, Royalton and Zeigler in the Counties of Saline, Williamson and Franklin to the Cairo-Chicago line of the defendant at DuQuoin, thence north to Chicago, and west by the St. Louis line from DuQuoin to St. Louis in the State of Missouri.

[fol. 11] That about the time coal development began in Saline County as aforesaid a like development occurred in the north half of the County of Williamson and the south half of the County of Franklin, in said state, and large

and extensive mining industries have been located at the places aforesaid, perhaps, the largest soft coal producing territory of like area in the United States and certainly the largest in Illinois; that the Illinois Central has equipped its railroad between Eldorado and Du Quoin for the transportation of said coal as aforesaid; that the railway of the Illinois Central from St. Louis to Eldorado is located through comparatively level territory, the grades are light and construction on the line of its location comparatively inexpensive; that said railway is operated between St. Louis and Eldorado by a large number of passenger and freight trains daily and such coal trains as are necessary or reasonably required to transport all of the coal produced in that territory to market; that as to the Illinois Central's motive power and coal cars it is one of the best equipped railways in the United States and has within the last three years greatly extended its lines into coal fields and developed large coal producing territory in the State of Kentucky as well as extended its lines into coal fields in the State of Illinois; that said Illinois Central is aggressive and progressive and financially able and physically capable of supplying to its Eldorado-St. Louis Railway sufficient improvements, motive power, cars, tracks and equipment as are or shall be [fol. 12] deemed necessary to transport promptly all coal produced upon its railway at Eldorado and at all points upon its lines in that district; and is aggressively endeavoring to extend its coal carrying business into new territory and increase the same, and of rendering to the J. K. Dering Coal Company for its Eldorado mine adequate and efficient service to enable it to sell coal in all markets available to the coal producers of Illinois.

VI

Establishment of Joint Rates Would Meet Complaint of Dering.—That both the Illinois Central Railroad Company and your Petitioner are subject to control of the Interstate Commerce Commission of the United States and the Illinois Commerce Commission in the establishment of through joint rates and routes on coal from Eldorado to all points both intrastate and interstate through any and all connections with other railways located in the Mississippi Valley;

that there is no territory in the State of Illinois or in the Mississippi Valley or tributary to the coal district of Eldorado and Harrisburg that cannot be conveniently reached from Eldorado over the lines of the Illinois Central Railroad; that the principal outlet for coal from the Eldorado-Harrisburg district is the Chicago market and the switching and terminal railroad district of Chicago and to railways and industries located in the northwest reached through the Chicago gateway; that the territory south of Harrisburg and Eldorado in Illinois and south of the Ohio [fol. 13] River in Kentucky and Tennessee is supplied from the Kentucky, Tennessee and Alabama coal fields; that east of the railway of Petitioner in Indiana, Ohio and Michigan is supplied from the West Virginia, Indiana, Kentucky and Ohio fields and locally between Eldorado and the Chicago district by the Indiana, Ohio, West Virginia fields and the mines of Vermilion County; that the territory west of the Chicago-Cairo line of the Illinois Central in Illinois is supplied with coal from the mines of Jackson, Perry, Randolph, Washington, St. Clair, Marion, Macoupin, Montgomery, Shelby, Christian, Sangamon, Tazewell, Peoria, McLean, La Salle and Grundy Counties and from the non-union fields of Kentucky, Tennessee, Ohio and West Virginia.

VII

Character and Capacity of Eldorado-St. Louis Branch.—That the Eldorado-St. Louis line of the Illinois Central connects with the line of your petitioner at a joint station in the City of Eldorado, and approaches the line of your petitioner at an acute angle extending in a southeasterly direction to such connection; that there is a wye connection between the railway of your petitioner and the railway of the Illinois Central at Eldorado, and the station and terminal facilities in Eldorado are owned by your petitioner and used jointly with it by the Illinois Central under contract; that freight can be conveniently and readily interchanged between a line of your petitioner and the line of the Illinois Central Railroad Company at Eldorado; that [fol. 14] the petitioner has a double track railway between Carrier Mills, Harrisburg and Eldorado, used and operated as north or east bound and south or westbound tracks and

also in taking coal cars from its classification of cars at Harrisburg to and from the mines at Eldorado and between Eldorado and Carrier Mills; that between Harrisburg and Eldorado said tracks are the most used and active tracks on its said railway and in peak or maximum operation, resulting from practically average maximum production from operating mines on said railway, said tracks and the facilities for making up and movement of trains over said tracks and in said yard, have fully reached the maximum of capacity for safe operation, so that any additional business added to said tracks would require additional facilities in passing tracks, motive power and switching tracks estimated to cost not less than $250,000.00, but additional business can without such additional expense be accepted through the connection with the Illinois Central at Eldorado and switched in the Eldorado yards and classified enroute at Mt. Carmel without such additional facilities; that these tracks between Eldorado and Harrisburg are in the general switching district in which cars are moved from Harrisburg yards to and from mines in the Carrier Mills Harrisburg, Eldorado district, but the switching district of Eldorado extends only from the freight station in Eldorado north .3 and south 1.3 miles.

[fol. 15]

VIII

Deering Mine Location and Alleged Agreements.—That in 1917 the defendant, J. K. Dering Coal Company acquired a tract of about three thousand five hundred (3,500) acres of coal land located on the Illinois Central about two and one-half (2½) miles northwest of the connection between the tracks of the Illinois Central and the tracks of petitioner in Eldorado and about a mile and a half outside of the corporate limits and switching district of Eldorado; said defendant also then owned a mine located a mile or so northwest of Eldorado on the railway of petitioner known as Dering Mine No. 3.

Said tract of coal land extended north and east of the railway of the Illinois Central and south and west of that railway to a line one-half mile west or northwest of the railway of petitioner, and between May and September of 1917 the Vice President of said defendant conferred with the Vice President and General Manager of petitioner concerning a

reciprocal switching arrangement between the two railway companies by which Dering Mine No. 3, and the new mine about to be opened on said tract of land on the Illinois Central known as Dering Mine No. 2 should be treated and served as joint mines on the two railways, and the Vice President of petitioner tentatively agreed to enter into such an arrangement at such time as Pering Mine No. 2 should reach a production practically equivalent to that of Dering Mine No. 3, which occurred in 1919; that the operation of [fol. 16] railways had then passed into the hands and control of the Director General of Railroads, and on application of the Dering Company to have said tentative agreement made effective it was declined by the representative of the Director General of Railways, and thereupon said Dering Company complained to the Interstate Commerce Commission, and prayed an order of said Commission against said Director General requiring such reciprocal switching arrangement to be made effective, and said Commission declined to do so upon the ground that to so require the same would be in effect to require the petitioner to extend its rails from its main line to said Dering Mine No. 2, which said Commission had no right to do, and dismissed said complaint and made a report and order to that effect in Dering Mines Company vs. Director General, I. C. C. Docket Number 10,945, which is in words and figures of Exhibit "No. 2" hereto annexed and made a part hereof. (62 I. C. C. 265.)

Thereafter the Vice President and General Counsel of said defendant J. K. Dering Coal Company, Mr. Pauley and Mr. C. B. Cardy, sought to devise some means of obtaining by some agreement with the officers of the Federal Railroad Administration in charge of the railway of this Petitioner to give direct service to said Dering Mine Number 2 in some manner to evade the force and effect of said decision and order of the Interstate Commerce Commission, and one of the plans discussed and attempted to be worked out between them was the construction of a spur track from some point on the line of Petitioner's railway [fol. 17] within the switch limits of Eldorado to connect with the mine tracks of said defendant at its mine Number Two but no contract or agreement was reached; that the attitude of the officials of the Railroad Administration,

and of Petitioner concerning all of said negotiations is shown by the following letters in relation thereto, introduced in evidence in the proceedings hereinafter set forth before the Illinois Commerce Commission and the Interstate Commerce Commission to-wti:

The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.

Cincinnati, Ohio, June 25, 1917.

Mr. James B. Pauley, Vice-Pres., J. K. Dering Coal Co., Eldorado, Ill.

Dear Sir: Your letter of June 22nd, in regard to the switching arrangement between the Big Four and Illinois Central at your two mines near Eldorado.

My understanding is that the mine on the Illinois Central has not yet been begun, or, at least, has not yet reached the point of producing. It seems to me that it is going to be difficult to arrange to handle this matter until the two mines reach approximately the point of equal production. When this is the condition, it seems to me there would be no objection to our entering into the arrangement that you propose. In the meantime, it is not clear to me how we can handle the matter, as, of course, we would not consider [fol. 18] giving up any portion of the Eldorado output unless we can get at least as much in return.

Yours truly, (Signed) H. A. Worcester, Vice-Pres. & Gen. Mgr.

The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.

Cincinnati, Ohio, Oct. 8, 1917.

Mr. J. K. Dering, Pres. J. K. Dering Coal Co., 1914 McCormick Bldg., Chicago, Ill.

Dear Sir: I enclose your letter addressed to Mr. Crowley, Vice President of the New York Central lines. Mr. Crowley has nothing at all to do with the Big 4.

I talked this matter over with your Mr. Pauley sometime ago and told him that I had no objection to making the arrangement that was proposed, with the understanding that it would not be effective until the new mine on the Illinois Central tracks reached a point of production equal

to that of the Eldorado mine. It would be manifestly unfair to make any other arrangements, as we would be losing coal from property on our tracks until such equality of production was reached.

Yours truly (Signed) H. A. Worcester, Vice-Pres. & Gen. Mgr.

[fol. 19] The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.

Cincinnati, Ohio, Oct. 22, 1921.

New track to J. K. Dering Coal Co.

My Dear Mr. Pauley: I have your letter September 2nd. Since my interview with you Mr. Stevenson has had a talk with your Mr. Cardy, at which he stated my position very plainly.

I think you will find that he answered your inquiry very completely. The substance of this interview was, that the only way in which you could be served would be to have you build your own track at your own expense entirely, from your mine to our main track within the switching limits of Eldorado.

Yours very truly, (Signed) H. A. Worcester, Vice-President.

Mr. James B. Pauley, Vice-Pres. J. K. Dering Coal Co., 1914-1920 McCormick Bldg., Chicago, Ill.

The Cleveland Cincinnati, Chicago & St. Louis Ry. Co.

Cincinnati, Ohio, Oct. 28, 1921.

New track of J. K. Dering Coal Co.—switching limits, Eldorado—file 81

My Dear Mr. Pauley: Your letter of October 24th.

[fol. 20] Switching limits north of Eldorado are .3 miles from the freight station and south 1.3 miles.

Yours truly, (Signed) H. A. Worcester, Vice-President.

Mr. James B. Pauley, Vice-Pres. J. K. Dering Coal Co., 1914-1920 McCormick Bldg., Chicago, Ill.

Cincinnati, Ohio, Nov. 1st, 1921.

Dear Mr. Cardy: Referring to our conversation in Chicago on September 14th, at which time you brought up the question of the Big Four effecting track connection with Dering Mine No. 2, located on the Illinois Central near Eldorado.

This question has been given the most careful consideration. If your Company care to construct and maintain at your own expense a track from your mine up to our line, we will be glad to effect connection with such track, the point of connection of course to be designated by our Operating Department.

Very truly yours, (Signed) W. T. Stevenson.

[fol. 21] Mr. Clarence B. Cardy, General Counsel, J. K. Dering Coal Co., 1920 McCormick Bldg., Chicago, Ill.

That the letter of Mr. Stevenson to Mr. Cardy under date of November 21st, 1921, and the letters of Mr. Worcester of October 22nd, 1921 and October 28th, 1921, to Mr. Pauley refer to a conference between Mr. Cardy and Mr. Stevenson held on September 14th, 1921, in which Mr. Stevenson stated to Mr. Cardy the uttermost limit to which the Petitioner would go in extending service to the Dering Mine No. 2 to be that the Petitioner would accept traffic delivered to it as Mr. Stevenson said, "at a point to be designated by our Operating Department" and as specified by Mr. Worcester to be made within the switching limits of Eldorado at some point not further than 1.3 miles south of the freight station in Eldorado; that said proposition was not accepted or acted upon by the said defendant but thereafter it secretly and in complicity and co-operation and conspiracy with the defendant, the Illinois Central and the defendant, Southern Illinois Railway & Power Company attempted to obtain by indirect proceedings before the Illinois Commerce Commission and the Interstate Commerce Commission through deceitful and false pretenses and representations and forcible action attempted and are attempting to unlawfully establish and maintain a connecting railway be-

[fol. 22] tween the Illinois Central Railroad, the railway of the Southern Illinois Railway and Power Company, and the railway of your Petitioner, connected with the railway of Petitioner at a point about four and one-half miles south of Eldorado, and thereby take from your Petitioner the coal traffic which it had theretofore at great cost developed upon its railway; upon the false pretense that the said track is needed as an industrial spur track connection to the mine of said coal company, because of the inadequacy of railway service given to it by the facilities and railway of the defendant, the Illinois Central Railroad Company, whereas, in truth and in fact the agreement and real and major purpose of said defendants was and is to establish such connecting track as a part of the railway system of said railway companies and extend their railways and transportation business into new territory, and incidentally locate the mine of said Coal Company on the railway of Petitioner, without a certificate of public convenience and necessity from either the Illinois Commerce Commission or the Interstate Commerce Commission, contrary to law, and in excess of the charter power of said J. K. Dering Coal Company.

IX

Location of Dering Mine and Contracts with I. C. and Electric Railway Companies.—That the mine tipple and mine switch tracks of the Dering Mine No. 2 are located north or northeast of the main track of the said Illinois Central and are so connected with a lead track which connects all of said mine switch tracks with the main track of [fol. 23] said Illinois Central that cars can be moved freely from all of said mine switch tracks to and on the main track of said Illinois Central; and there is located on the west side of the railway of Petitioner about four and one-half miles south of Eldorado a mine known as Wasson Mine No. 1, the property of the Wasson Coal Company. The distance from said Dering Mine to a point on the railway of Petitioner near said Wasson Mine No. 1 is three and one-half miles, and intervening are three public highways; that about the month of December 1922, the said defendants made and entered into two certain contracts and duly executed and delivered the same, one between said Dering

Company and said Illinois Central, and the other between said Dering Company and the Southern Illinois Railway and Power Company, except that signatures and dates were inserted in the words and figures following, to-wit:

"This Agreement, made and entered into this twentieth day of December, A. D. 1922, by and between the Illinois Central Railroad Company, party of the first part, hereinafter called the Railroad Company, and the J. K. Dering Coal Company, a corporation, of Chicago, Illinois, party of the second part, hereinafter called the Coal Company, Witnesseth:

"Whereas, the Coal Company operates a coal mine in the vicinity of Mile Post 118 from East St. Louis, adjoining the right of way and tracks of the Railroad Company near Eldorado, Illinois, and in order to facilitate the handling of its business, desires to construct a track connecting with the lead from the main track of the Railroad Company to the mine tracks serving the Coal Company's mine to a connection with the track of the Big Four at a point about 2¼ miles due south of the connection with the track of the Railroad Company, the location of said track and connections being approximately as indicated in red [fol. 24] on the plat hereto attached and made a part hereof; and,

"Whereas, the Coal Company desires that the Railroad Company construct and maintain said track at the expense of the Coal Company; and,

"Whereas, said proposed track will cross at grade the main track of the Railroad Company, and the Railroad Company is willing to permit such crossing, including connection of said proposed track to the track of the Railroad Company, and to construct and maintain said proposed track for the Coal Company.

"Now, therefore, the Railroad Company in consideration of the covenants and agreements of the Coal Company hereinafter expressed, hereby grants to the Coal Company the right to lay down, maintain and operate a single track railway of standard gauge over and across its waylands and tracks at a point — feet West of Mile Post 118, and to connect said track with the lead leading out of the Railroad Company's main track to the mine tracks of the Coal Company, which grant is made subject to the following conditions:

"1. Said track shall be constructed upon and across said waylands and tracks of the Railroad Company, including its connection with the track of the Railroad Company at such location and in accordance with such plans and specifications as shall have been approved or prepared by the Chief Engineer of the Railroad Company, and shall at all times be maintained in first-class condition to the satisfaction of said Chief Engineer, or his duly authorized representative.

"2. Notwithstanding the grant herein made, the Railroad Company shall have the right at any time to change the grade of its roadbed and tracks, or to install additional tracks over the track of the Coal Company herein authorized to be laid, and the Coal Company agrees at its own expense, to change the grade of its roadbed and track to conform to the grade of the roadbed and tracks of the Railroad Company, and to assume all expense incident thereto, or to install and thereafter maintain, at its own expense, such additional crossing or crossings to accommodate the additional track or tracks constructed by the Railroad Company. The crossing or crossings to be installed by the Coal Company in such event shall be of the same weight of [fol. 25] material as used in the rails of the tracks of the Railroad Company, and of such designs, character and quality as shall be satisfactory to said Chief Engineer.

"3. In the passage of trains over said crossing the trains of the Railroad Company shall have prior right of way over said crossing in preference to trains using or operating over the track of the Coal Company.

"4. Whenever the Railroad Company, or the laws of the State of Illinois, or any other lawful authorities, shall require a flagman or flagmen to be stationed at said crossing, or shall require said crossing to be protected by signal or gates, or by interlocking and derailing system, or any other safety appliances, in any such case the Railroad Company shall employ, as hereinafter provided, and pay the wages of such flagmen, and shall employ, as hereinafter provided, and pay the wages of all persons required for the operation of any such signals, gates, interlocking and derailing plant, or other safety appliances, and shall fur-

nish all supplies and pay all other expenses of operating the same, and after the construction of any such signals, gates, interlocking and derailing plants or other safety appliances, shall repair, maintain and renew the same from time to time as may be necessary, and the Coal Company hereby agrees within fifteen (15) days after the presentation of bills therefor to repay to the Railroad Company all expense incurred by the Railroad Company for the purposes mentioned in this paragraph.

"And the Coal Company shall also, at its own cost and expense, provide and put in place, or cause to be provided and put in place, in accordance with plans and specifications prescribed by the chief engineer of the Railroad Company, and approved by the Illinois Commerce Commission, or other legal authority having jurisdiction over railroad crossings in said state, all such signals, gates, interlocking and derailing plant or other safety appliances which may be so required at said crossing. Such plans and specifications shall include the preparation and change in the tracks of both parties incident to the application and use of any such signals, gates, interlocking and derailing plants or other safety appliances, the connection of the tracks of both parties therewith and all other things necessary to the proper working of such appliances, and to provide for the protection and operation of the railroads of both parties in connection therewith.

[fol. 26] "In case the Railroad Company shall construct any additional tracks, switches, crossovers or connections within the limits of said interlocking plant, the Railroad Company shall furnish all labor and material required for additions to or alterations in said plant to include the operation of said additional tracks, switches, crossovers, crossings or connections, and the Coal Company agrees to reimburse the Railroad Company for all expenses so incurred within fifteen (15) days after bill shall have been rendered therefor, plus the percentages on labor and material as provided in Article 6 hereof.

"5. The Coal Company shall, at its own expense, procure all right of way required for said track and secure the necessary permission from governmental authorities to construct, maintain, operate and use said track and make proper arrangements with the Southern Illinois Railway &

Power Company and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company over which and with which companies' tracks said track to be constructed hereunder is to cross and connect.

"6. The Railroad Company agrees after the provisions of Article 5 hereunder shall have been complied with by the Coal Company, and the payment to it by the Coal Company of the sum of sixty thousand dollars ($60,000.00) to lay and construct said track and furnish all material needed therefor. It is understood and acknowledged that the amount to be paid by the Coal Company represents the entire estimated cost of the work to be done and material to be furnished by the Railroad Company in the construction of said track, and it is agreed that if the actual cost of said work and material, plus 10 per cent on labor to cover supervision and accounting and 15 per cent on material to cover freight and cost of handling, shall be more or less than said sum, an adjustment shall be made between the parties hereto, to the end that the Coal Company shall only be required to pay to the Railroad Company the actual cost incurred by the Railroad Company in laying and constructing said track, plus said percentages.

"It is mutually understood and agreed that in the event the Coal Company is unable to arrange for a physical connection between said track and the tracks of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, or be assured of the transportation service of the Cleveland, Cin- [fol. 27] cinnati, Chicago & St. Louis Railway Company for coal produced at said mine, and comply with the provisions of Article 5, then there shall be no obligation on the part of said Coal Company to construct or pay for the construction of said track, and all of the obligations imposed by this contract on the respective parties hereto shall be made null and void.

"7. The Railroad Company further agrees to maintain said tracks in suitable condition, furnishing all labor and material required therefor, and the Coal Company agrees, within ten (10) days after receipt of statement to reimburse the Railroad Company for all expense actually incurred by the Railroad Company in the maintenance of said track, plus the percentage hereinabove mentioned on labor and material.

"8. It is expressly understood and agreed that the employes of the Railroad Company while engaged in the construction and maintenance of said track and supervision of such work shall, while so engaged, be considered the sole employes of the Coal Company, and the Coal Company hereby agrees to assume all liability for death of or injury to such employes, the property of said employes, death of or injury to persons, damage or injury to property whatsoever, which may in any way be attributable to the negligence, acts or omissions of said employes, or the construction and maintenance of said track.

"9. All persons employed for the protection, construction and maintenance of said crossing or crossings herein contemplated, or the operation of any such signals, gates, interlocking or safety appliances, shall be deemed the employes of the Coal Company, and the Coal Company agrees to assume all responsibility for the negligence of such employes, and to indemnify and save harmless the Railroad Company from any loss, costs, damages and expense, including attorneys' fees, which it may incur or suffer, caused by growing out of, or in any way attributable to the negligence of such employes.

"The Coal Company further agrees to assume all responsibility for, and to indemnify the Railroad Company against any liability for death of or injury to persons, damage or injury to property, which may be attributable to the construction, maintenance, existence or use of said crossing or crossings, it being understood that said track and crossings [fol. 28] to be constructed hereunder are to be used by other railroad companies in order to serve the Coal Company's said mine, and that the Coal Company assumes all responsibility and liability on account of the use of said track and crossings by such railroad companies as in its agreement provided, the same as if the Coal Company were operating its own engines and cars over said track and crossings.

"10. Payment of any bills rendered by the Railroad Company hereunder shall not be delayed on account of any dispute or disagreement, but the disputed items shall be promptly considered and adjusted and in case the claim of the Coal Company shall be found correct, any amounts due the Coal Company on account of such adjustment shall be

repaid and refunded by the Railroad Company within ten (10) days after such adjustment shall have been made.

"All bills rendered by the Railroad Company against the Coal Company for labor and material furnished by the Railroad Company hereunder shall include 10 per cent on the cost of labor to cover supervision and accounting and 15 per cent on material to cover freight charges and cost of handling; provided, however, that said percentages shall not apply on the wages or regularly assigned employes stationed at said crossing as flagmen or to operate interlocking plant or other safety device.

"11. As a further consideration for the covenants and agreements to be kept and performed by the Railroad Company herein provided the Coal Company does and hereby grants to the Railroad Company the right to use said track and operate its engines and cars thereover, jointly with such other company or companies as may be permitted by the Coal Company to use said track, and also the right to construct spur tracks leading out of said track, but the expense in connection with such spur tracks shall be assumed by the Railroad Company. The Railroad Company agrees to use said track in such manner as to not unreasonably interfere with the use to be made of same by any other company or companies. The Coal Company further grants to the Railroad Company the right to construct a track connecting with the main track of the Railroad Company, and said track to be constructed by the Coal Company hereunder, but all expense in connection therewith shall be assumed by the Railroad Company.

[fol. 29] "12. This agreement shall continue in force so long as said track to be constructed hereunder shall be used for the purpose of handling coal from said mine or mines of the Coal Company, and when said track shall be no longer required for such purpose this contract shall terminate and be of no further force or effect save as to those obligations accruing prior thereto, and the Coal Company shall take up and remove that portion of said track, including the crossing frogs in the tracks of the Railroad Company, as well as any other property of the Coal Company located upon said waylands, and restore said track and waylands of the Railroad Company substantially to their previous con-

dition. If the Coal Company shall fail to make such removal and restoration within ten (10) days after this contract shall have terminated, the Railroad Company shall have the right, at its option, to remove that portion of said track located upon its waylands, including crossing frogs or any other property of the Coal Company located thereon, and restore its waylands and track substantially to their previous condition, at the risk and expense of the Coal Company.

"13. Upon termination of this agreement, or when said track shall be no longer required by the Coal Company, the Railroad Company shall have the option of purchasing all of said track indicated in red on the plat hereto attached, and the Coal Company agrees to sell same to the Railroad Company, if it desires to purchase, at a price to be mutually agreed upon, but in no event shall said price be greater than the actual cost to the Coal Company; and if the Railroad Company does not desire to purchase said track, that portion thereof, including said crossings, located on the waylands of the Railroad Company shall be removed therefrom as in the next preceding article hereof provided.

"14. This agreement shall be binding upon the successors and assigns of the parties hereto, but the Coal Company shall not assign, transfer or underlet to any other company or person any of the privileges herein granted by the Railroad Company, or any interest in this contract, without the consent of the Railroad Company first having been obtained.

"15. This contract is made subject to the approval of the Illinois Commerce Commission.

[fol. 30] In Witness Whereof, the parties hereto have caused these presents to be executed in duplicate, by their duly authorized officers, the day and year first above written.

"This Agreement, entered into this — day of ——, 192-, between J. K. Dering Coal Co., a corporation of the State of Illinois, party of the first part, and the Southern Illinois Railway and Power Company, a corporation of the State of Illinois, party of the second part,

"Witness- That,

"Whereas, the party of the second part is a common carrier engaged in the transportation of passengers and freight for hire, operating an electric line of railroad in Saline County, Illinois; and,

"Whereas, the party of the first part owns and operates a coal mine in Saline County, Illinois, and is desirous of having constructed a track from its said mine to a connection with the Cleveland, Cincinnati, Chicago and St. Louis Railway Company in said Saline County, for the purpose of shipping coal produced at its said mine over the line of said Cleveland, Cincinnati, Chicago and St. Louis Railway Company, which track will cross at grade the line of railroad of the party of the second part, substantially as shown on blue print hereto attached, marked "Exhibit A," and made a part hereof.

"Now, Therefore, for and in consideration of the sum of one dollar, each to the other in hand paid, and the mutual covenants and agreements hereinafter set forth, the parties hereto hereby agree as follows:

"1. Party of the second part agrees to permit party of the first part, its agents, successors or assigns, to construct upon and across its line of railroad a railroad track, hereinafter referred to as "mine lead track" at a point about — miles from the City of Eldorado, Illinois, as shown on the blue print attached hereto and made a part hereof; said mine lead track to be used in addition to the uses thereof by party of the second part hereinafter set forth, for the purpose of transporting railroad cars, loaded and empty, between the mine of the party of the first part of any other industry or point of connection located upon or along said mine lead track, and the track connection from said mine lead track to the tracks of the Cleveland, Cincinnati, Chi- [fol. 31] cago and St. Louis Railway Company, near the City of Eldorado, Saline County, Illinois.

"2. Said party of the second part hereby grants and conveys to the party of the first part, its successors and assigns, for a period of ninety-nine years from the date hereof, a right of way for said mine lead track over and across the track and right of way of party of the second part for the uses and purposes in this agreement provided, including the right to construct, maintain and repair said mine lead track, and the right to operate locomotives, trains

and cars upon said mine lead track, over and across said track and right of way of party of the second part, and the right also to permit the Illinois Central Railroad Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, or any other railroad, to so operate over said mine lead track and said right of way, subject to the rights of party of the second part in this agreement provided.

"3. Party of the first part hereby grants and conveys to party of the second part the right to operate locomotives or electric engines, trains and cars over said mine-lead track for the purpose of transporting passengers and freight from and to all points of origin and destination on said mine-lead track, or transporting freight and passengers originating and distant from and to points on the connecting line, and the right to construct, on and from said mine-lead track, and over and upon the right of way of said mine-lead track, a wye or other suitable track connection between said mine-lead track and the track of party of the second part, and agrees to pay to party of the second part one-half of the cost and expense of the installation and construction of such wye or connection promptly upon the completion thereof.

"4. Party of the first part also grants and conveys to party of the second part the right to construct along, upon and over the right of way of said mine-lead track, or adjacent thereto, as party of the second part may desire, poles and wires for the transmission of electric power to be used in the operation of its said engines, trains and cars; provided, that said poles and wires shall be so constructed as to permit steam locomotives railroad operation upon and over said mine-lead track and as not to unreasonably interfere with the use of said mine-lead track by the party of the first part, its agents, lessees, successors or assigns. And [fol. 32] party of the first part also grants and conveys to the party of the second part the right to construct along and upon the right of way of said mine-lead track, poles and wires for the transmission of electric energy for power and sale purposes, provided that the poles and wires so constructed for said last-mentioned use shall be so located as not to interfere with the use of said mine-lead track.

"5. Said party of the second part shall conduct said transportation and railroad operations over said mine lead track in such manner as will not unreasonably interfere with the transportation of loaded and empty coal cars to and from the said mine of party of the first part, or to and from any other mine or industry now or hereafter located on, or adjacent to, said mine lead track.

"6. As a further consideration for the covenants and agreements to be kept and performed by the party of the first part the party of the second part agrees that it will, at the request of said party of the first part, transport empty and loaded coal cars between the mine of party of the first part and the tracks of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and charge for such service the usual and customary connecting line switching rates generally maintained and published by the coal-carrying railroads in the State of Illinois for performing similar service. In performing any service desired by said first party under this section, it is understood that said second party shall act as the agent of the first party in performing said service.

"7. In the event other industries or mines are served over and by said mine lead track, the cost to party of the first part of constructing and maintaining said mine lead track shall be apportioned between party of the first part and such other industries in proportion to the amount of use of said mine lead track for party of the first part and the use of said mine lead track for such other industry.

"8. Party of the first part shall pay the entire cost and expense of constructing said mine lead track and the cost thereof over the existing track and the right of way of party of the second part herein granted, and also the additional cost and expense made necessary by said crossing in the installation or construction by party of the second part of additional tracks along and over said crossing.

[fol. 33] "9. It is mutually agreed between the parties hereto that the costs of construction and maintenance of protection gates or other protection devices required by the Illinois Commerce Commission or other Governmental authority for the protection of the crossing of said coal company's tracks over the tracks of the party of the sec-

ond part, shall be paid for and borne equally between the parties hereto.

"10. Party of the second part will indemnify and save harmless party of the first part against any and all suits, claims, judgments, awards, expenses or loss growing out of damage to property, or injury to or death of any person or persons resulting from the operation by party of the second part of its said engines, trains or cars upon said mine-lead track, or from the construction and location of its said poles and wires on the right of way of said mine-lead track.

"11. In the event party of the second part shall use said mine-lead track for transporting engines, trains or cars carrying either passengers or freight, or both, party of the second part will pay to party of the first part its proportion of the expense of maintaining said track, including the expense incurred by said first party in maintaining, protecting and operating said tracks over the tracks of the Illinois Central Railroad Company, said maintenance expense to be apportioned on the basis of the number of cars of party of the second part passing over said mine-lead track to the total number of cars passing over the same.

"12. It is understood between the parties hereto that the party of the first part has heretofore entered into a contract with the Illinois Central Railroad Company, dated ——, ——, concerning the construction, maintenance, operation and use of said track and crossing over the Illinois Central Railroad Company's tracks whereby the Illinois Central Railroad Company is granted certain rights, and the party of the first part has assumed certain liabilities and obligations, copy of which contract is attached hereto and made a part hereof and marked "Exhibit B"; and it is agreed between the parties hereto that the rights granted and conveyed by said first party are subject to the limitations and conditions imposed upon it under the terms and conditions of its said contract with the Illinois Central Railroad Company.

[fol. 34] "It is further covenanted and agreed that said second party assume all responsibility for and agrees to indemnify the party of the first part for all loss, damage or liability that said first party may suffer or be required

to pay, assumed by and imposed upon said first party under the terms and conditions of its said contract with the Illinois Central Railroad Company, or otherwise caused by the use and operation of said tracks and crossing by the party of the second part under the grant herein made.

"13. Party of the first part specifically reserves the right to abandon and cease operating said mine lead track at any time, and will, upon so doing, surrender the right of way herein granted, and upon such surrender the rights and obligations of the parties hereunder shall cease and determine; provided, that in event of the termination of this agreement by abandonment and surrender as aforesaid, each party shall have the right, notwithstanding such termination, to recover from the other any obligation or liability which shall have accrued under this agreement while the same was effective and in operation; provided, further, that upon such abandonment, and a failure by party of the second part to purchase as hereinafter provided, party of the first part shall at its expense and at the request of party of the second part, remove said crossing over the track or tracks of party of the second part and restore the track or tracks of the party of the second part to proper operating condition. And provided, further, that in event the Illinois Central Railroad Company does not desire to purchase said track, as provided, in said contract hereto attached that sixty days prior to such abandonment party of the first part will give notice thereof in writing to party of the second part and will at the request of party of the second part transfer and convey to party of the second part, by proper instruments of conveyance, said mine lead track and all rights and appurtenances thereunto appertaining and belonging at and for an amount equal to the cost thereof to party of the first part, less such sum as will equal then existing physical depreciation.

"14. It is mutually understood and agreed between the parties hereto that the primary purpose for which said track is being constructed by the Coal Company is to use the same in the shipping of coal produced at said mine over the railroad of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and in event that said Coal Company is [fol. 35] unable to arrange for a physical connection between said track and the tracks of the Cleveland, Cincinnati,

Chicago and St. Louis Railway Company, or to be assured of the transportation service of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, as aforesaid, then there shall be no obligation on the part of said Coal Company to construct or operate said track, and all of the obligations imposed by this contract on the respective parties hereto shall be null and void.

"In Witness Whereof, the parties hereto have caused this agreement to be executed the day and year first above written."

That after the execution of said contracts the said defendants jointly filed with the Illinois Commerce Commission a petition praying for permission and authority to construct a track misnamed in said petition a "mine lead track," connected with and from the main tracks of the Dering Mine No. 2 across the Illinois Central main track, south across three public highways, and across the main tracks of the railway of the Southern Illinois Railway and Power Company intended to be connected with the main track of the Petitioner at a point near Wasson Mine No. 1; but the said defendants did not file with said petition the contracts aforesaid, nor allege their existence, nor otherwise call attention to said contracts but asked the Commission to base its order solely on the stipulations contained in said petition, and the stipulation or agreement of the Highway Commissioner of Raleigh Township consenting to crossings of said highways; that said Commission without a hearing and only after an ex parte inspection by one of its engineers, purported to enter an order authorizing the Illinois Central [fol. 36] Railroad Company to construct and maintain said proposed track as prayed, in case Docket Number 12819, and prescribed the character of such construction and the crossing protection to be placed at the crossing of said railways; that said Petitioners knew the interest of this Petitioner in said proceeding and that the same would be opposed by it, nevertheless, proceeded as aforesaid; that in addition to the provisions of said contracts it was also agreed between the said Dering Company and the said Illinois Central Railroad Company, acting through their officers and agents, that the said connection with the Illinois Central was and was to be predicated and condi-

tioned upon the ability of the said Petitioners to make such connection with the mine of Wasson Mine No. 1, as the Illinois Central should receive from Wasson Mine No. 1 or other mines to be served by it by transportation over said track to the Illinois Central an equivalent amount of coal for transportation as that taken from the Dering Mine to the rails of Petitioner so that the construction, maintenance and operation of said track and the proposed connection therewith should not result in financial benefit to the Petitioner, and said contract of the Illinois Central was by said side agreement to be binding upon the Illinois Central only upon that condition; that in the negotiations leading to said contract, the Wasson Coal Company was solicited by said Dering Company to participate and assist the said defendants in obtaining the construction and connection of said track with the rails of Petitioner; that the said Wasson Company was and is the owner of a large tract of undeveloped [fol. 37] coal land north of the Illinois Central which by extending said track north to said undeveloped coal property the same could be served thereby and if said track so extended should be constructed and maintained with proposed connections would give transportation therefrom both to the railway of the Illinois Central and the railway of the Petitioner; that the said Wasson Company thereupon attempted to obtain an agreement from the Illinois Central to such extension and use of said track in case of its construction and refused to give assistance to the proposed enterprise without such an agreement; that said Illinois Central declined to agree to or permit the extension of said track to the property of said Wasson Company and predicated its refusal upon the ground that such extension would allow your Petitioner to invade coal producing territory naturally tributary to the Illinois Central and declined to admit said Wasson Company into co-operation and in said enterprise upon such terms, notwithstanding it was then attempting a similar invasion of the tributary territory of this Petitioner.

X

Proceedings Before Illinois Commission in Same Matter and for Same Relief.—That after the order of the

Illinois Commerce Commission was obtained in Docket No. 12,819, as aforesaid, on December 27, 1922, the J. K. Dering Coal Company filed under Docket No. 12,891, before said Commission a petition for a physical switch connection of the track authorized by the order in Docket No. 12,819, with the main track of your petitioner setting [fol. 38] forth substantially the same facts as are contained in a petition later filed with the Interstate Commerce Commission in Docket No. 15,552, J. K. Dering Coal Company v. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; that among other things said petition alleged that the petitioner therein contemplated the construction of a railroad switch track from its said mine to the right-of-way and railroad track of the defendant for the purpose of delivering coal to the defendant for shipment as aforesaid; a copy of which petition to the Illinois Commerce Commission is for greater certainty hereto attached as Exhibit 3, to this bill and made a part hereof; that the contracts aforesaid and the private agreement between the said Dering Company and said Illinois Central was not referred to in said petition, but it was alleged that said track had been authorized by the Illinois Commerce Commission, but not stated that authority to construct the same had been granted to the Illinois Central and the said petition on the contrary proceeded upon the theory that the track was to be constructed solely at the expense, for the purpose and use of the said Dering Company; that upon a hearing of said cause it was developed by cross examination that said contracts were in existence; that said private track contract had been made and that the true purpose of said proceeding was to establish and maintain a new connecting railway by extending the railway of the Illinois Central to and connecting the same with the railway of the Southern Illinois Railway and Power Company and also the railway of this petitioner at a point near Wasson Mine No. 2; and, [fol. 39] after the development of said facts such proceedings were had as to result in the setting aside of the order entered into in No. 12,819, the consolidation of that cause with the cause No. 12,891, for hearing and the filing of amended answers; that the consolidated cause was heard upon these issues: (1) Whether the Commission

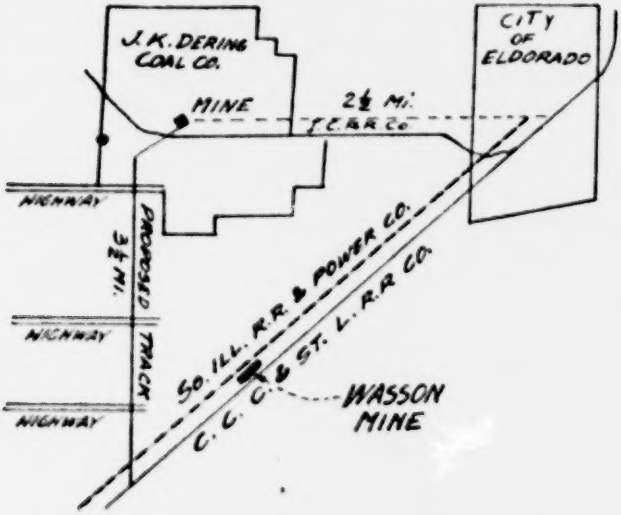
had the authority to ignore that the proposed track would be constructed across three public highways and two railways without a certificate of convenience and necessity from either the Illinois Commerce Commission or the Interstate Commerce Commission; (2) whether said track was such a track as is contemplated and authorized to be constructed under the provisions of Section 45 of the Illinois Commerce Act; (3) whether the Dering Coal Company had the corporate power and authority under its charter as an Illinois corporation authorized to produce and sell coal, to own and lease or operate and maintain a railroad track over which cars are moved or to be moved from the point of shipment to market; (4) whether the Illinois Commerce Commission had exclusive jurisdiction, notwithstanding the express provisions of Paragraph 20-22 of the Transportation Act amendment to the Interstate Commerce Commission Act; (5) whether the said track was a necessary facility for the transportation of coal within the provisions of the Illinois Commerce Act; (6) whether said track would be built for the purpose of maintaining competition between railways notwithstanding the Illinois Commerce Act and the Federal Transportation [fol. 40] Act without a certificate of public convenience and necessity; (7) whether it was an unreasonable discrimination for this petitioner to refuse to construct this track and accept coal for transportation from an industry located on the main line of the Illinois Central Railroad; that these several questions were decided in favor of the petitioner, the Dering Company, and orders were entered by the Illinois Commerce Commission authorizing the said Dering Company to construct, own and operate said track by itself or through the agency of others, and requiring this petitioner to permit, build and maintain a track connection therewith as prayed; that this petitioner presented a petition to said Illinois Commerce Commission for a rehearing in the consolidated case, appealed the same to the Circuit Court of Saline County, Illinois, where it was affirmed, and further appealed the same to the Supreme Court of the State of Illinois, where the orders of said Commission were reversed and the following principles established as the law of said case: (1) That the proposed track leading from a coal mine to the main line

of a railroad three and one-half ($3\frac{1}{2}$) miles away cannot be said to be a private side track where the coal mine is located on the line of another railroad and the proposed track will effect a connection between two railroad lines and such track, and, when allowed to be constructed by proper authority will become a part of the public railways of the State regardless of any limitations of its use in any contracts between the railways or in the order of the authority granting the right to construct the same; (2) that [fol. 41] where the effect of allowing a coal mining company to build a railroad track from its mine to another railroad line will make a connection between the latter and a railroad line upon which the mine is located, the building of the proposed track constitutes a railroad extension which is not within the jurisdiction of the Illinois Commerce Commission where the two railroads connected are interstate railways but within the jurisdiction of the Interstate Commerce Commission; (3) that the provisions of Section 5, Article 13 of the Constitution of Illinois, that, "all railroad companies shall permit connections to be made with their tracks so that any such consignee and any public warehouse, coal bank or coal yard may be reached by cars on said railroad," does not apply where the industry seeking connection with a certain railroad is already served by another company and making the proposed connection would amount to an extension of or connection of two railroad lines; (4) that in the absence of constitutional or statutory provisions requiring the same a railroad company cannot be compelled to receive or deliver freight from or to a point off its lines, and Section 5, Article 13, of the Constitution does not require a railroad company to permit track connections with a coal mine off its road; (5) that Section 45 of the Public Utilities Act of Illinois providing for connections of private industry of a shipper or receiver of freight with an existing railroad line does not apply where the effect of such connection is to join lines of two interstate carriers constituting an extension of their lines, as such [fol. 42] connection is under the sole jurisdiction of the Interstate Commerce Commission; that the Public Utilities Act of Illinois gives no power to grant to a private coal corporation authority to build, lease, own or operate a rail-

road; (6) that a mining corporation is not a public utility, but is a private enterprise and possesses no charter powers to build, own, lease or operate a railroad.

That during the pendency of said proceedings in the Circuit Court of Saline County the said defendant, J. K. Dering Coal Company without authority of law, but contrary thereto, and in violation of the penal provisions of both the Illinois Commerce Act and the Interstate Commerce Act, as amended by the Transportation Act, began and completed the construction of said railway as shown and indicated by the following sketch, to-wit:

Plat Showing Locus in Quo.



[fol. 43] Track Constructed in Violation of Suspension Order.—That a large portion of said construction was carried on and said track completed, except connection with the railway of this petitioner, in violation of a suspension order of the Circuit Court of Saline County suspending and superseding the orders of the Illinois Commerce Commission.

Filing Petition in 15552 I. C. C. While Illinois Case Pending.—That upon the appeal of the cause from the Circuit

Court of Saline County to the Supreme Court of the State of Illinois the said J. K. Dering Coal Company filed a petition in Docket No. 15,552, before the Interstate Commerce Commission asking the same relief upon substantially the same grounds as alleged in the said petition before the Illinois Commerce Commission and for certainty as to identity of issues in said two causes this petitioner annexes hereto copies of said petitions and the same are marked Exhibits 3 and 4, and made a part hereof.

That the petition of the Dering Company was filed before the Interstate Commerce Commission January 23, 1924, after the issues between the said Dering Company and this Petitioner were well known to both from the hearings before the Illinois Commission, and at the instance of said Dering Company was at once referred to Mr. W. P. Bartel, Director of Bureau of Service, of said Commission for hearing; that said petition is predicated on provisions of Paragraph (g) Section 1, of the Interstate Commerce Act of February 4, 1887, as amended, and while it contains aver- [fol. 44] ments sufficient to confer jurisdiction of a proper cause under said section upon the Commission (if said section be construed literally and not be held to have been amended by the subsequent Transportation Act), a consideration of the evidence relied upon to establish the same goes much further and seeks relief ex legis upon grounds not relevant to anything contained in that paragraph or authorized by any provision of the Interstate Commerce Act; that the record shows that the theory presented by the Dering Company was that aside from the jurisdictional averments of the petition (See Exhibit 3, of Bill), the Dering Company should have relief upon these grounds: (1) That before the location of Dering Mine No. 2, it was tentatively agreed between this petitioner and the Dering Company that a reciprocal switching arrangement should be entered into between this petitioner and the Illinois Central Railroad Company by which Dering Mine No. 2, and Dering Mine No. 3, should both be treated as joint mines on both railroads at such time as Dering Mine No. 2, should reach an equivalent to that of Dering Mine No. 3, and the Dering Company located its mine tipple on the East instead of the West side of the Illinois Central in contemplation that such tentative agreement would be carried out;

(2) That the service rendered by the Illinois Central Railroad on account of the location of its classification yard at Du Quoin fifty (50) miles away and the general character of its road being an alleged branch line is unable to give it a prompt and adequate car supply and movement of [fol. 45] mined coal from Dering Mine No. 2, to market, and the market conditions are such and markets so located that with the proposed connection the Dering Company would have a somewhat greater output of coal and would be able to more satisfactorily and efficiently operate its mine. This petitioner filed an answer denying the affirmative allegations of the petition filed by the Dering Company which formed these issues: (a) Whether the petitioner, the Dering Company, was in law the owner of such a track as might be lawfully connected with the railway of this petitioner; (b) Whether the proposed connection would be reasonable, practicable and could be put in with safety and used without materially increasing the hazards of operation of the railroad of this petitioner; (c) Whether the business reasonably expected to be received by this petitioner from the Dering Company over said connection would be sufficient to justify the expense of construction and maintenance of such connection; (d) Whether the switch connection with the railroad of this petitioner is necesary to transport to destination coal produced at said mine of the Dering Company to points of destination; that this defendant also by its said answer affirmatively denied: (1) That said Dering Company has any power or authority under its charter to build, own, operate or lease a railroad either for its own use, or for the use of others, or for the transportation of coal from its mine tipple, or point of production located on one railway to a connection with another railway for any purpose, or to accomplish any object, and that it does not have the right, power or authority under its [fol. 46] charter to construct, own, or operate such a line of railroad to a point distant therefrom and connect the same with another railroad for the purpose or with the effect of making or constituting the mine of complainant an industry on the railway of defendant and to enable it to demand a supply of cars from the defendants, and especially does not have that power or authority if it already has a direct main line connection over the railroad upon

which it is located with the same railroad with which the proposed connection is sought at a more convenient point and within a shorter distance; (2) That it owes to the Dering Company the duty under the Act of Congress to permit it to build and connect a track from its mine so located as to connect the same with the defendant's railway for the sole purpose of constituting it an industry on petitioner's railway, and avers that to require it to do so without its consent in the absence of charter provisions authorizing such construction would be to arbitrarily take its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States; (3) That the complainant is not entitled to the relief prayed upon any grounds stated in the complaint of the Dering Company (See Exhibit 3, Bill), because of the following matters and things alleged as an affirmative defense.

That by the answer in No. 15,552 in the Interstate Commerce Commission and similar proceedings had before the Illinois Commerce Commission the complainant seeks to obtain the connection of the alleged mine lead track with the railway of defendant and thereby in legal effect and for [fol. 47] practical purposes compel the defendant to extend its railway to and in connection with the railway of the Illinois Central and enable the Illinois Central to use said track as a part of its railway in connection with the railway of the Southern Illinois Railway and Power Company and thereby extend the coal hauling facilities of the Illinois Central Railroad from the mine of complainant to the alleged connection and thence over the rails of the Southern Illinois Railway and Power Company parallel with the railway of defendant southwesterly on the north side of its main track of railway to Harrisburg, thence to Carrier Mills, and so enable the Illinois Central Railroad Company to compete with the defendant for the transportation of coal from all of the mines located on the railway of the defendant in Saline County; that more than fifteen (15) years ago the defendant reconstructed its railway from Danville to Harrisburg by lowering its grade, reballasting the same and laying heavy rails, reconstructing its bridges, constructing passing tracks and double tracks to enable it to haul long and heavy trains of coal cars, and constructed an expensive classification yard at Harrisburg for the handling

of coal, built a main track spur from Harrisburg, called its Saline Valley Line, into the coal field of Saline County, all at an expense of ten millions of dollars, to enable defendant to handle the coal business of the territory tributary to its said railway in said county; that since said improvement twenty-one (21) mines have been located on the railway of defendant from Harrisburg south southwestward to [fol. 48] Carrier Mills and on said Saline Valley Railway; that by agreements between the Illinois Central Railroad and complainant and between the Southern Illinois Railway and Power Company and complainant, complainant has provided for the operation of the said Southern Illinois Railway and Power Company's railway in connection with said alleged mine lead track to and in connection with the Illinois Central Railroad and the operation of the Illinois Central Railroad over said alleged mine lead track to and in connection with the said Southern Illinois Railway and Power Company's track; that heretofore the said Southern Illinois Railway and Power Company had not engaged in the transportation of freights to any large extent and has hauled only local freights from the connection of the Illinois Central with said railway at Eldorado to local points along said railway; that its railway is an electric railway designed primarily to haul passengers in the mining district from Eldorado to Carrier Mills (See Exhibit I to Bill); it has not become a common carrier generally of freights to any other or greater extent than as aforesaid and has not become a carrier of coal actually or by any agreement or arrangement with any other railway, but the object and purpose of the said railways and the said complainant is that when said mine lead track shall be completed it will be operated for the transportation of both passengers and freight as a main line of railway in extension of the said Southern Illinois Railway and Power Company's railway [fol. 49] and as a main track from which spurs are to be extended into the coal field of Saline County naturally tributary to the railway of the defendant; that if said track should be so operated it would enable the Southern Illinois Railway and Power Company to connect with practically all of the mines on the railway of the defendant and by said track connected with the Illinois Central Railroad said mines would in effect become mines upon the railway of the Illinois

Central Railroad Company; that the contracts referred to contain provisions which would accomplish this purpose, unexecuted copies of which for the purpose of showing the provisions of the contracts actually executed and in existence are hereto attached marked "Exhibits A and B" to Exhibit 5, and previously quoted herein; that after the execution of these contracts without the knowledge of this defendant and without making the defendant a party to said proceeding, the said complainant and the said railway companies made a joint application to the Illinois Commerce Commission and by agreement obtained an order of said Commission, without hearing, granting to the Illinois Central Railroad Company the power and authority to construct and operate said alleged mine lead track and maintain the same in accordance with the provisions of said contracts, a copy of which said order is hereto annexed marked "Exhibit C" to Exhibit 5 and made a part hereof; that thereafter at a hearing before the Illinois Commerce Commission on an application by the complainant for an order requiring a track connection between said alleged [fol. 50] mine lead track and the railway of defendant, the defendant made a motion to set aside said order, consolidate said causes, and for hearing of the consolidated cause, which was allowed, and said causes consolidated and said hearing had; that at said hearing the complainant and his counsel disclaimed any intention to compel or ask that the defendant operate said mine lead track and disclaimed that said application was made for the purpose of obtaining additional cars from the defendant to supply its said mine, but insisted that said application was made for the sole reason that the Illinois Central did not furnish adequate facilities to reach the markets and stated that it made no complaint of the Illinois Central for failure to furnish an adequate supply of cars; that said complainant well knew that when said tracks were built according to the plants provided by said contracts and connected with the railway of the defendant, the railways of the Southern Illinois Railway and Power Company and the Illinois Central Railroad Company said track would constitute under the Constitution and laws of Illinois a part of the railway public highway of the State free for the use of all persons whatsoever, and that when said construction was accomplished no agency of

the State of Illinois or of the United States would have power, jurisdiction or authority to prevent the use of said tracks as railways; that the complainant induced the Illinois Commerce Commission to enter an order authorizing [fol. 51] the construction of said track and another order requiring the defendant to permit a track connection therewith; that the defendant appealed from said orders to the Circuit Court of Saline County, said cause was heard on November 5, 1923, and an order entered January 11, 1924, affirming said orders; that there has been a further appeal by the defendant from said orders to the Supreme Court of the State of Illinois; that while said cause was pending in the Circuit Court of Saline County suspension orders were entered by said court suspending the force and effect of said orders pending said appeal, which under the law of Illinois went to the April term, 1924, of the Supreme Court of Illinois; that said orders when entered provided upon their face that said track when installed shall be used only as a mine lead track in taking cars from the railway of defendant to said mine for loading and returning said cars to the connection with defendant's railway and not otherwise; that said construction pursuant to said contracts and the orders of said Commission, or pursuant to the orders of said Commission independently of said contract, would in legal effect extend the railway of the Illinois Central Railroad Company to the connection with the railway of the Southern Illinois Railway and Power Company and the railways of the defendant and an extension of the railway of the defendant to the connection of said track with the Illinois Central Railroad and said orders were entered without making application either to the Illinois Commerce Commission or to the Interstate Commerce Commission for a certificate of convenience and neces- [fol. 52] sity; that said orders are in excess of the power and jurisdiction of the Illinois Commerce Commission and in conflict with the jurisdiction and power of the Interstate Commerce Commission; that the limitation in said orders limiting the use of said tracks when constructed is void and of no effect, because in conflict with the express provisions of the Constitution of Illinois; that it is but a distance of approximately twelve or fifteen miles northwest on through the coal fields of Saline County to the

point at which the Illinois Central is now constructing and proposes to construct its main line railroad from Edgewood, Illinois, to Fulton, Kentucky, for the transportation of coal from said territory; that said new line of railroad will cross and connect with the Eldorado branch, on which complainant's mine is located; that said mine will have the use of not only the adequate facilities now provided it for reaching the markets, but in connection with said main line would as located practically have the advantages incident to a direct connection with the main line equivalent to the average line located on spur from a trunk line; that if the complaint of want of transportation facilities had been in good faith this new construction would obviate and meet all complaint of that character and put said mine on the main double-track railway of the Illinois Central Railroad Company from Chicago to New Orleans, and all of its connections.

[fol. 53] That for greater certainty as to the issues presented by the said answer the same is hereto annexed as Exhibit 5, and made a part hereof.

XI

Failure of Proofs Before Interstate Commerce Commission.—That in the hearings before the Interstate Commerce Commission the issues aforesaid upon which Complainant either by allegations of its complaint or by charges and claims of its counsel in support thereof had the burden of proof and either failed to prove the same or the same were completely refuted by the admissions of complainant or uncontroverted testimony establishing the facts adverse to complainant's contention, as follows: (1) The location of Dering Mine No. 2, on Illinois Central Railroad two miles and one-half from the connection with the railway of petitioner; the proposed connection with the railway of petitioner four miles and one-half South of the connection between the railway of petitioner and the Illinois Central; the location and extent of the Illinois Central Railroad system and its relative location at the locus in quo; the location of petitioner's railway; the location of the railway of the Southern Illinois Railway and Power Company; the location of the proposed track; the location of the mining prop-

erties of the Dering Company; the location of Wasson Mine No. 1; that the physical connection between the Illinois Central and the railway of this petitioner is open for use and can be used at all times for cars to and from the rail- [fol. 54] way of this petitioner to Dering Mine No. 2; that this petitioner has accepted and is willing to accept all carload freight including coal tendered to it over such connection for transportation for such reasonable freight rates as are or may be prescribed by the Interstate Commerce Commission and the Illinois Commerce Commission; that the Illinois Central is a road having many more and more direct outlets for the transportation of coal to the markets available to and reached by coal producers from the Harrisburg-Eldorado field; These are facts established by the allegations of the complaint, evidence offered by the Dering Company and the railway and other maps showing locations and connections, together with the testimony of the Vice-President of the complainant as to the shipments of coal from that territory and from his mine; (2) The facts just specified establish that Dering Mine No. 2, is not located on the railway of petitioner and is not in a situation to require the petitioner to extend its facilities or transportation to it under the provisions of Section 1, of the Interstate Commerce Act of 1887, as amended and supplemented; (3) they also establish that no written application has been made for a switch-track connection between the railway of petitioner and a switch-track of the defendant, the track with which the proposed connection is sought not being a switch track, a spur-track or industrial track within the meaning of Paragraph (6) Section 1, of the Interstate Commerce Act as amended, the character and intended uses of [fol. 55] said track being expressed by said contracts and not controverted; (4) While the evidence is conflicting as to whether the physical connection between the railway track of petitioner and the proposed track of the Dering Company would be safe, the evidence shows without conflict that additional movements on the main tracks of petitioner between Eldorado and Harrisburg would greatly increase the hazard, that the tracks with which the same would be connected at the point of connection are burdened to maximum capacity by the mines on the railway of petitioner; that such facilities are adequate, except in times of peak

production, but the proposed addition of coal shipments to be offered at the will of the Dering Company would necessitate an additional investment by petitioner of many thousands of dollars for additional tracks, an additional switching crew and motive power to transport this additional coal when offered, and would give to the petitioner no additional revenue; that it also appears without conflict that the same traffic given to petitioner over the connection between the Illinois Central and the petitioner at Eldorado could be absorbed and efficiently handled through the local yards and switching facilities at Eldorado and Mt. Carmel without such additional hazard and expenses, and that the proposed track connection is not physically needed in order to give to the Dering Company the use of the railway of petitioner and all connections and markets accessible over [fol. 56] its lines; and that, therefore, the proposed connection is not reasonably practicable; (5) That the agreement between the Dering Company and the Illinois Central Company is that no more coal shall be offered for transportation over the lines of this petitioner from Dering Mine No. 2 than shall be received over said track from mines located upon and tributary to the railway of this petitioner; that the only testimony offered on behalf of the complainant to establish the allegation of the complaint, "that the business which may reasonably be expected to be received by such defendant from the complainant over said connection will be sufficient to justify the expense of construction and maintenance of such switch connection by defendant," is the testimany of the Vice President of the Dering Company: "that it would be natural to divide the production of the mine of fifty cars per day between the Illinois Central and the Big Four," but he did not testify that he would so divide it. On the other hand, he testified unequivocally to said contract between his company and the Illinois Central to the effect that no more revenue should be given from his mine to petitioner than should be received by the Illinois Central from mines located on the railway of petitioner, and the testimony shows that it would cost $2,000.00 to construct the proposed connection not including maintenance and an additional outlay running into many thousands of dollars to construct additional facilities to make the petitioner ready to handle the additional coal

[fol. 57] traffic of the Dering Company when at its option offered, and petitioner would be compelled to accept such traffic when and where offered at peak production of mines on its railway. Therefore the testimony of complainant failed to establish this allegation of Paragraph 4 of the complaint; (6) The facts already alluded to establish without controversy the negative of the following allegation of Paragraph 4 of said complaint: "That said switch connection with the railroad of said defendant is necessary to transport to destination coal produced at the mine of the complainant to said points of destination," meaning points in Illinois, Indiana, Iowa, Wisconsin and other states; (7) That the only testimony offered to prove the inadequacy of the facilities of the Illinois Central to supply cars and transport coal from the mine of complainant to points of destination on the Illinois Central and through connections with the Illinois Central to all points in the United States was the mere speculation of the vice-president of the complainant and a witness by the name of Fenton both of whom admitted on cross-examination that they had no personal knowledge in relation to the condition of the railway of the Illinois Central, its capacity to supply such facilities or the causes of failure of the mine of complainant to operate to as full capacity as other mines in the territory with which comparisons were made, except that they knew that their car supply came from Du Quoin a distance of fifty (50) miles away; and they without knowledge or reason attributed all interferences and failures in the operation of their mine to the failure of the Illinois Central to supply cars [fol. 58] and move loaded cars from the mine to Du Quoin. Their testimony was based exclusively upon statistics taken from what is called the Honnold Bureau, a private statistical bureau and consisted solely of comparisons without showing similarity of operating or economic conditions of operation of the mines with which comparisons were made. The cross-examination of the witness, Fenton, disclosed that the officers and servants of said coal company having actual knowledge of conditions at the mine were those in direct charge; that neither he nor the vice-president had that information; that the mine clerk and officers and agents at the mine made daily reports of conditions and that such reports were in the files of the complainant at Chicago

but not produced. None of the witnesses having knowledge either of conditions upon the Illinois Central, the capacity of the Illinois Central to supply facilities and the relation of service given to demand therefor given by the Illinois Central to complainant, nor was anyone having knowledge of the actual conditions of operation either at the mine of complainant or the mines with which comparisons were instituted produced as a witness. Nor was any effort made to procure or produce such witnesses when it was pointed out upon the hearing that no relevant or competent evidence had been offered on this subject. Therefore, no other evidence than mere hearsay guesses and speculation was offered to support this contention; The Illinois Supreme [fol. 59] Court having a record before it on this point similar to the record before the Interstate Commission analyzing the same with reference to the contended lack of service from Illinois Central said:

"The record shows that this line of the Illinois Central is a branch of a very large system or railroads having a number of branch lines supplying numerous other coal mines in that region. No complaint to the Illinois Central arising out of the lack of cars appears to have been made or any proceedings had to secure more service from it. It is not shown that the coal company is unable to reach any desirable market with the service given by the Illinois Central."

that the facts there found are without controversy, the facts of the record before the Interstate Commission in said cause; (8) As to the contention of complainant that petitioner had not kept an agreement to give reciprocal switching service to Dering Mines Nos. 2 and 3, and as between the Illinois Central Railroad and the railroad of petitioner to treat both mines as joint mines on both railways the testimony established: (a) That when the time was reached in 1919 to carry such tentative agreement into effect the Director General of Railroads then operating the railway of petitioner through his officers refused to carry out such agreement; (b) Upon formal complaint by the Dering Company to the Interstate Commission it denied the right of Complainant to have said agreement carried out; (c) Negotiations were then entered into by

the complainant through its vice-president and general attorney which finally resulted in a proposition of petitioner to permit a connection but not to operate the track or re-
[fol. 60] ceive coal under such agreement, such connection to be if made, within the switching limits of Eldorado. No such track was ever projected or built by the Dering Company and the proposition was never accepted. The track which was built was first projected to connect with the railway of petitioner at the Wasson Mine Number 1, and such track is the track which the petitioner obtained permission of the Illinois Commission to build, but failing after the hearing before the Illinois Commission to obtain right of way for the construction thereof the track was in fact built a half or three-fourths of a mile further west and connected about a half mile south of the property of the Wasson Coal Company at Mine Number 1; (9) That about 1905 when there had been little development of coal producing property in the Harrisburg-Eldorado district the Petitioner at an expense of approximately twenty millions of dollars reconstructed its railway from Harrisburg to Danville by straightening its main track, lowering its grades, laying very heavy rail, constructing passing tracks and switch tracks, strong and permanent bridges, and an extensive yard and switches for handling coal traffic at Harrisburg, double tracks between Harrisburg and Carrier Mills and a main line railroad called the Saline Valley into the coal-producing territory of Saline County north and northwest of Harrisburg; that twenty-one mines are located upon the railway of petitioner between Eldorado and Carrier Mills and on the Saline Valley and its spurs; that all of said mines would be reached by connection with the proposed
[fol. 61] track and give to the Illinois Central direct competition with Petitioner over the railway of the Southern Illinois Railway and Power Company. It would also give the Illinois Central the right to extend spurs from the proposed track into other coal-producing territory north and northwest of the railway of petitioner naturally tributary to the railway of petitioner and not now served by any railway; that the Illinois Central is constructing a railway from Edgewood, Illinois, to Fulton, Kentucky, which will pass through the west side of Saline County and invade the coal-producing territory of said county undeveloped and

tributary to the railway of Petitioner; that the mines in said Saline County and Illinois have not on an average been for the last three years operated to exceed fifty (50%) per cent capacity on account of the excessive development of coal producing territory during the war and mining conditions in the State of Illinois as compared with mining conditions in the adjacent state of Kentucky, and the states of West Virginia, Ohio and Tennessee is very bad and growing worse on account of differences in mining rates and conditions.

XII

Proceedings Before Director Bartel.—That after the hearing before the Interstate Commerce Commission the said cause was submitted to the said W. P. Bartel upon the facts of the record, including the evidence and record in the cause heard before the Illinois Commission; that the [fol. 62] facts introduced in evidence upon the hearing before the said Bartel were substantially the same as those heard before the Illinois Commerce Commission as hereinbefore averred and hereinbefore briefly set out; that thereafter, about the middle of October, 1924, the said Bartel filed herein his report and recommended an order granting the relief prayed; that said report is quoted at length in the next succeeding paragraph (XIII) of this bill. Petitioner filed exceptions to said report on November 18, 1924, as follows:

(I)

"The proposed report only contains a recital of the contentions of the respective parties and does not make specific findings upon the material issues presented by the petition and answer, and thereby establish the facts upon which an order is to be based."

(II)

"The proposed report does not pass upon the issues presented by the defendant's answer, supported by testimony and its brief filed herein."

(III)

"The proposed report does not suggest findings of the specific facts and recommend that the order of the Commission be based thereon."

(IV)

"The proposed report does not embrace all of the material facts, and such of those as are mentioned is by way of recital and not by way of specific findings and settlement of issues."

[fol. 63] (V)

"The recommended finding that 'complainant's siding has been constructed,' is contrary to the fact in that it assumes that the complainant is the lawful owner of the track, and that it has the lawful right to own, maintain and operate the same, either by itself or through a common carrier.

(VI)

"The recommended finding that the petitioner has tendered interstate traffic within the meaning of Section 1, Paragraph 9, of the Interstate Commerce Act is contrary to the fact and the law."

(VII)

"The recommended finding that the proposed track connection is 'reasonably practicable and can be put in with safety' is contrary to the facts as shown by the evidence and the report is not in accordance with the evidence in that respect."

(VIII)

"The recommendation of a finding that there is sufficient business to justify the construction and maintenance of the proposed connection is not warranted by any of the facts appearing in the record."

(IX)

"The report proposed would ignore and not pass upon three out of four of the vital contentions of the defendant stated in the proposed report, although all of them are

material, founded in the issues and indispensable to a correct decision and a lawful order of the Commission." (This will appear in an analysis of the proposed report hereinafter.)

(X)

"On page 4 of the petition the petitioner recognized that to sustain his petition he was required to establish a reasonable necessity for the track connection and inserted therein the followin averment:
[fol. 64] 'That said switch connection with the railroad of said defendant is necessary to transport to destination coal produced at the mine of the complainant to said points of destination.'"

(And, thereafter, it was shown by the said exceptions in detail that said averment was wholly unsupported by the evidence.)

(XI)

The defendant excepts to that part of the proposed report which seems to infer that the defendant agreed to give service to the petitioner's mine by a track connection and subsequently refused to carry out its agreement to connect with the track which has been built.

(Here it is shown by analysis of the evidence that the track connection built was one which had never been discussed by the parties, and that the correspondence heretofore stated between the officers of the Federal Director and the officers of the petitioner did not reach an agreement for the construction of the track here involved.)

XIII

Report of Bartel and Specific Objections Thereto.—That in the presentation of said exceptions this petitioner quoted at length the proposed report of Director W. P. Bartel and interlined in parentheses criticisms and objections thereto founded upon general exceptions aforesaid, which briefly show the position and contentions of this petitioner in the hearing of said exceptions, which for convenience and briefly to show to this Honorable Court the specific con-
[fol. 65] tentions of the petitioner upon said hearing are quoted herein as follows:

Report Proposed by Director W. P. Bartel

(*Black Type* and interlineations in parenthesis ours)

Complainant, an Illinois corporation, engaged in the mining of coal in Saline County in southern Illinois, by complainant filed January 23, 1924, alleges that the failure and refusal of defendant to construct, maintain, operate or install a switch connection between *its line of railroad and a switch track constructed by complainant and extending from its coal mine to defendant's right of way:*

(The plat annexed to the petition, or complaint shows that it is not a switch track with which the connection is sought, but a connecting railway, connecting the Illinois Central Railroad with defendant's railway.)

and that the failure and refusal of defendant to receive or accept carload shipments of coal for interstate transportation, and to furnish cars for such traffic, is in violation of Section 1 of the Interstate Commerce Act. The Commission is asked to require the defendant to construct and maintain a switch connection, to accept interstate shipments of coal tendered it and to award complainant by way of reparation all damages sustained by it from December 1, 1923, and the effective date of the Commission's order.

In 1917 complainant acquired approximately 3,700 acres of coal land near Eldorado in Saline County, Ill., of which [fol. 66] approximately 3,400 acres remain unmined. The amount of the coal unmined in the acreage is estimated to be between twenty-eight and thirty million tons. The hoisting shaft and mine tipple of complainant are located about the center of this acreage and two and one-half miles northwest of the defendant's right of way, and immediately north of the right of way of the Eldorado branch of the Illinois Central, hereinafter called the Central. *This branch extends from DuQuoin through Benton in Franklin County to Eldorado in Saline County and connects at Eldorado with defendant's Cairo division, running in a northeasterly and southwesterly direction between Danville, Ill., to Cairo, Ill.*

(This branch has daily rapid freight service from St. Louis to Eldorado and operates six passenger and a number of freight trains between those points (Rec., pp. 464-470.)

Complainant's mine was constructed to produce, and has a potential capacity of, 4,000 tons per day, and complainant claims it should easily and regularly produce 3,500 tons per day. It is said to be one of the most modern equipped mines in Saline County, but has not reached its full development. The maximum amount produced is between 2,700 and 2,800 tons per day or between fifty and sixty cars. Complainant *maintains* that the potential capacity could be produced without enlarging the mine capacity or facilities by increasing the *labor supply*.

The principal reason advanced for the failure of the mine to develop properly is that the Central is unable to furnish sufficient car service. *The mine is located on a* [fol. 67] *branch line about fifty miles from the assembling yard and the Central, by reason of curves, grades and other conditions, is unable to handle in excess of twenty-five loads per train from the mine to the assembly yard.*

(The mine is not on a branch line any more than is the Cairo Division of the Big Four a branch line. It is on the St. Louis-Eldorado Division of the I. C., which gives daily fast service with a large number of trains (Rec., pp. 468-470).)

Complainant asserts that the mine would soon reach its capacity if it were granted the additional service of the defendant. *At the hearing counsel for complainant admitted that this was their sole object in building a switch track and asking for a connection thereto.*

Prior to the acquisition of the coal lands by complainant negotiations were entered into with the defendant and the Central relative to securing service from both carriers. Complainant already had in operation its No. 3 mine, located on the defendant's line about one and one-half miles east of Eldorado. The arrangement *proposed* was that when the production of the two mines was approximately equal defendant would enter into a reciprocal switching arrangement with the Central, whereby the latter would serve complainant's mine on the line of defendant and defendant would in turn serve complainant's mine on the

Central. The production agreed upon was reached in 1919. Application was then made to have proposed arrangement consummated. *Defendant, instead of proceeding with the proposed reciprocal switching arrangement, suggested the building of a private track from the mine to a point on their line west of Eldorado.*

[fol. 68] (This arrangement was not carried out because when the production contemplated was reached the Federal Government was operating the railroad and the Railroad Administration refused to carry it out. Mr. Cary stated into the record the following: "I will admit that it was during Federal control that the Big Four (Federal) Railroad Administration refused to proceed with this matter" (Rec., p. 27). "They stated in the letter that they did not make any expenditures during the period of Federal control" (Rec., p. 27).)

This latter proposal was made during the period of federal control.

(And, this proposition was made by Federal officers operating the road and declared before the termination of Federal control. Mr. Pauley testified: "Mr. Worcester (Federal Manager of the Big Four) objected to making the reciprocal arrangement and it was proposed by Mr. Brister (Federal Traffic Manager) that the service be effected by a track from our mine to the Big Four" (Rec., p. 22). "The Big Four declined this tentative arrangement finally" (Rec., p. 27). That was during Federal control" (Rec., p. 27). "All of the matters we have discussed up to this time, Mr. Examiner, were during Federal control" (Rec., p. 28).)

A survey was made by an engineering corps of the defendant and the location of the track proposed does not materially differ from the one which has been constructed. Defendant refused to proceed further in accordance with their suggestion or to arrange for the consummation of the reciprocal switching arragement. Following this complaint in Dering Mine Co. v. Director General, 62 I. C. C. 265, was filed, wherein a joint status for complainant's mines was sought. That complaint was decided adversely to the Dering Company on June 17, 1921. Following this [fol. 69] decision further negotiations were conducted. On

November 1, 1921, defendant, through its traffic manager, advised complainant by letter as follows:

"If your company cares to construct and maintain at your own expense a track from your mine up to our line, we will be glad to effect connection with such track, the point of connection, of course, to be designated by our operating department."

(This letter was but a statement of the limit to which the Big Four would go pursuant to a request of Mr. Cardy, and was never accepted or acted upon, nor the Big Four operating department requested to designate the point of connection of any track (Exhibit 23, Stevenson's testimony, pp. 182-187) (Exhibit 23, pp. 174-179).)

Defendant now explains this letter as being a nice way of saying "No." *After the receipt of this communication complainant took steps to obtain a satisfactory right of way by options upon the land over which the proposed track was to be laid.*

(No options were obtained to lay a track of the kind discussed in these negotiations or in the letters to which reference has been made. No track connection has been proposed within the switching limits of Eldorado, nor at a point designated by the operating department of the Big Four, nor a mere sidetrack to render service exclusively to the mine of petitioner.)

These options were closed and the fee in the lands purchased at a cost of $33,000.00.

(No right of way was optioned or purchased until after the hearing was commenced before the Illinois Commerce Commission, January 11, 1923 (Rec., p. 126).)

In order to reach the line of defendant over this acquired property it was necessary to cross several highways, and the rights of way of the Central and the Southern Illinois [fol. 70] Railway and Power Company. The latter is an electric line operating between Eldorado and Carrier Mills, paralleling the line of the defendant on the north. It will hereinafter be referred to as the Power Company. Contracts were accordingly entered into between the complainant and the Power Company, and also between the com-

plainant and the Central. The contract with the latter provided inter alia for the construction of the switch track in question by the Central for the coal company for the sum of $60,000.00 but it was understood and agreed that if the actual cost of the work and material, plus a certain percentage to cover supervision and cost, and the freight charges on material would be more or less than that amount, an adjustment would be made.

Construction of the switch track of complainant was started in the latter part of 1923 and finished the first part of this year. It connects with the lead track of the Dering Coal Company, about 200 feet north of the crossing of the Central, and extends in a southerly direction toward the line of the defendant. It is constructed of what is known as relay 85-pound rails on creosoted or treated ties. The track is on from 12 to 18 inches of cinders, gravel, chats or screening ballast, and is in good line ad surface. The crossings with the Central and the Power Company are of 90-pound rail. There is one timber trestle which is of standard construction. The track ends approximately the line of the defendant's right of way. Between the right of way of the Power Company and that of defendant, where [fol. 71] the connection is sought, complainant has constructed two tracks, one of which they claim can be used as a passing or run-around track, and which will permit of the placing of empties on one track while loads are standing upon the other.

After the acquisition of the right of way for the switch track, but before construction thereof, the complainant made two written requests upon defendant for a connection. *After the construction of the track had been completed another request, dated January* 18, 1924,

(The record fails to establish that a written request was made of petitioner to connect with the proposed track before the filing of this complaint and after the track was complete.)

was made for such connection. On February 9 of this year, which was after this complaint had been filed, complainants offered to the defendant for billing and transportation one car of coal which was then standing at the extreme south end of the switch or mine lead track, at the right of way of defendant, and at which point a connection is sought. It

being impossible to accept this traffic at that point, defendant's agent at Eldorado so advised complainant, but stated that it would be accepted at Eldorado. It was not offered there and complainant's witness admitted that it had no record of ever having traffic refused which was offered for transportation by that route.

The cost of the connection is estimated at approximately $2,000.00, and complainant contends that inasmuch as they have expended a great sum for the construction of the [fol. 72] track and will maintain it the defendant ought to construct and maintain at its own expense the switch and all appurtenances thereto on its right of way.

It is contended by the complainant that the business which will be handled or received over such connection will be sufficient to justify the installation and maintenance.

(There is no evidence in the record fairly tending to prove that sufficient revenue would be derived from the track connection with petitioner's mine to render the traffic remunerative. Vice-president of defendant even limited an inclination to divide the traffic equally to the present time, that is when he was testifying (Rec., p. 90), and the testimony of Mr. Milligan and Mr. Stevenson showed clearly that it would not be remunerative, because of the additional overhead it would impose.)

A great percentage of the coal produced by complainant at the present time, and in the past, has moved primarily to Chicago or points beyond. Complainant contends that production in its mine has been curtailed to a great extent, because of the fact that there existed *no market* via the only outlet it had, namely, the Central. *There is also a contention and some testimony to the effect that complainant was precluded from markets in Michigan and Indiana, because coal dealers prefer a one-line haul.* In order to reach these markets

(This was merely a contention of a visionary witness who testified to no fact or experience to support his contentions, and the facts show that no market sought by petitioner over the lines of the Big Four could be reached by a one-line haul if the connection existed.)

[fol. 73] at the present time a haul via two or more lines is necessary.

The complainant states that at the time of the hearing in February, 1924, *its mine was getting out more than fifty cars a day, and it would be very natural for them to divide the tonnage approximately equal between the two railroads. The defendant would thus be furnished with substantial tonnage and sufficient revenue to warrant construction of the connection.*

(The statements and testimony of complainant as to division of shipments between the I. C. and Big Four was limited to what would be natural, and its witnesses carefully refrained from stating that such division would be made. Moreover, the testimony of Mr. Milligan and Mr. Stevenson shows that the connection would not be remunerative.)

Complainant introduced in evidence a statement which shows that four competing companies in Saline County, served by defendant, shipped during the year ended March 31, 1922, 52.9 *per cent of their total output to destinations other than in Illinois and the Chicago switching district, whereas complainants shipped* 27.7 *per cent to such other destinations. The contention is that this difference is caused by the wider range of markets* which are available by way of the defendant's line.

(This discrepancy was accounted for by the fact that the witness selected for his comparison mines having large coal contracts and mines assigned to the production of railroad fuel, instead of making the comparison with mines in that territory having like character of business as the Dering mine. (See cross-examination of witness Fenton, and testimony of witness Milligan).)

[fol. 74] Defendant's exhibit shows that for the period January to November, 1923, both inclusive, the mines in Southern Illinois, on its line, shipped 50.67 per cent of their total output to points in Illinois, which includes the Chicago switching district, while the Illinois Central mines in the same district shippeed 55.66 per cent of their output to the above destinations. To points in Iowa, Michigan and Indiana from defendant's mines there moved 9.26, 3.42 and 11.06 per cent, respectively, of their total output, compared with 12.55, 2.13 and 7.37 per cent, respectively, from mines on the Central to points in the same states. The tonnage represented by the above figures moving to Indiana over

defendant's line was to a large extent railroad fuel for the New York Central system lines.

(This difference was shown on cross-examination of the witness Fenton to be due to the character of business which the petitioner is able to obtain as compared with other mines with which comparison is made.)

Defendant operates between Eldorado and Harrisburg, at which point its assembly yard for that district is located, two tracks which it contends are main tracks, the northernmost of which complainant contends is used as a passing or run-around track, and which on defendant's exhibit is styled passing track. This northerly track extends from a point just north of Eldorado, where it leads off of the other track, and ends at Harrisburg, within the assembling yard. At the present time there are four switches leading into coal mines connected with this track between Eldorado and Harrisburg. It is with this track that complainant seeks [fol. 75] a connection, at a point 3.1 miles east of Harrisburg and 4.5 miles west of Eldorado. During the daytime and early evening this track is practically set aside for the movement of coal and empties to and from the various mines; the remainder of the time it is operated as a double track. From that track eight mines are served, and approximately 275 to 280 loads and the same number of empties are moved over it daily. During January of this year, the largest coal business for a month in the history of the field, 12,483 cars were loaded, and on both these tracks in one twenty-four-hour period there were operated a total of forty-seven trains. There have also been as high as twenty-five switch movements in addition to train movements over this track during a twenty-four-hour period. Defendant contends that additional business could not be handled with these facilities during the peak of business.

The same questions here involved have been considered by the Illinois Commerce Commission. On November 25, 1922, the Central, the Power Company and the complainant herein filed with the State Commission a joint petition asking for permission to extend a mine-lead track from Dering Mine No. 2 across the mine tracks of the carriers to a connection with the defendant. On December 14, 1922, the State Commission issued an order authorizing the Cen-

tral to construct such a track. An application was then made by the complainant in this case to the State Commission for an order requiring the defendant to make a switch connection with this proposed track. On petition of [fol. 76] *the defendant herein the first proceeding was reopened and consolidated with the latter. After further hearing before the State Commission an order was entered on May 3, 1923, authorizing the construction of a mine-lead track by the complainant, but limiting the use of such track to those ordinarily appurtenant to a lead track to a mine. On May 8, 1923, further orders were issued out of the same proceeding requiring the installation of a switch connection with defendant's track, but limiting its use in accordance with the order of May 3, 1923. From these orders an appeal was taken by defendant to the Circuit Court of Saline County, which court issued a stay order on October 3, 1923, pending final decision. On January 11, 1924, the Court approved and confirmed the orders of the State Commission and on the same date entered an order staying further proceedings for an appeal to the Supreme Court of the state. An appeal was then taken from the decision of the Circuit Court to the Supreme Court of the state, and is now pending before that tribunal.*

(The Commission cannot consider the orders of the Illinois Commerce Commission, nor the affirmance thereof by the Circuit Court of Saline County, as affording any support to the proposed report for the reason that both have been reversed and held null, void and without jurisdiction to enter or affirm the same by the Supreme Court of Illinois.)

In asking that we require the defendant to construct a switch connection with its switch track, complainant relies upon paragraph 9 of Section 1 of the Interstate Commerce Act. Before our authority under this paragraph can be invoked certain conditions must be observed. *The com-* [fol. 77] *plainant must be the owner of a lateral branch line of railroad or a shipper tendering interstate traffic for transportation. The connection must be reasonably practicable and one that can be put in with safety and will furnish sufficient business to justify the construction and maintenance of same.*

(It must also appear that the track with which connection is proposed is a track which was lawfully constructed, may be lawfully maintained and operated and it must be a switch track which the shipper on the railway with which the connection is sought has the lawful right to use.)

Defendant contends that complainant is not the owner of a lateral branch line railroad because it is not a railroad company and under the laws of Illinois would have no right, power or authority to construct, own, lease or operate a branch line of railroad connected with a railway engaged as a common carrier in interstate and intrastate commerce. Defendant further contends that it is not an application for a connection with a private sidetrack which may be connected with a railroad, for the reason that under the law of Illinois a railroad constructed on or across a public right of way or across a railway engaged in interstate and intrastate commerce is a public highway, and by connection of the rails of such railway with the rails of a common carrier railway, the railway so connected becomes under the Constitution of Illinois a part of the railway, public highway of the railway with which it is so connected, and is free and open to the [fol. 78] use of all persons for the transportation of their persons and property.

It is contended that the complainant is so located that it cannot construct a private siding connecting its mine with the railway of defendant, because no track could be constructed without crossing public highways and tracks of other public companies. Further, this mine is not located on the railway of defendant, and any track connecting its mine with the defendant's line would necessarily be a connecting railway for the reason that cars could be moved from the rails of defendant over the track and to and upon the main line of the Central. Defendant further contends that the making of the contracts with the Central and the Power Company conclusively establishes that the switch track with which the connection is sought is in fact a new railway, and in effect is intended to be an extension of the railways of both the Central and the Power Company into new territory without a certificate of convenience and necessity having first been obtained. Thus these two carriers would invade territory which by its location defendant contends rightfully belongs to it.

The contract with the Power Company provides that for the privilege of crossing its right of way complainant would grant to the Power Company the right to operate locomotives or electric engines, trains and cars over said track for the purpose of transporting passenger and freight from and to all points of origin and destination on said mine [fol. 79] lead track, or transporting freight and passengers originating and destined from and to points on the connecting line, and the right to construct on and from said mine lead track and over and upon the right of way of said mine lead track a wye or other suitable track connection between said mine lead track and the track of the Power Company.

The contract with the Central provided that for the right of permitting such crossing over its right of way the Coal Company granted to the Central the right to use the track and operate its engines and cars thereover for the purpose of serving the mine or mines of the Wasson Coal Company, located in the vicinity of the connection of that track, with the tracks of the Big Four, including also mines of any other company, or for any other purpose not inconsistent with the use of the track by the Coal Company. There was a further grant which permitted the Central to construct spur tracks leading out of said track. The expense incidental to these was to be assumed by the Central.

Specifically, the defendant opposes the installation of a switch connection or an order from this Commission requiring same, on the following grounds: (1) That the building and maintenance of such a track is beyond the scope of the powers granted the complainant by its Illinois charter; (2) that such a track, by reason of the contracts between the complainant and the Central and between complainant and Power Company, will, under the law of [fol. 80] Illinois, become a public track and be a part of the public highway of the railways with which it shall be connected, and that an order requiring the connection sought would in legal effect require an extension of the defendant's line to a point not consented to, and would in effect be a taking of property without due process of law and a denial to it of the equal protection of the law; (3) that the making of the proposed connection would complete a new connecting railway between the Central and defendant without a certificate of public convenience and necessity having first

been obtained as required by the Illinois Commerce Law and the Interstate Commerce Act; (4) that the connection would not be reasonably practicable, nor could it be put in with safety, nor would it furnish sufficient business to justify its construction and maintenance. *The first two contentions are primarily matters for judicial interpretation and they will not be further considered here.*

(If these are questions of judicial interpretation they would arise in a proceeding to contest the validity of this Commission's order. Therefore, the Commission cannot decline them, but must meet and determine for itself what is the rule applicable to the facts.)

Under the third contention the defendant argues that the construction of this mine lead track comes within the provisions of Paragraphs 18 to 21 of Section 1 of the Interstate Commerce Act. In other words, that it is an extension of the railway of the Central and that therefore a certificate of public convenience and necessity should first have been [fol. 81] obtained. To this we do not agree. *We are not here called upon to determine what effect the contracts heretofore referred to may have in the event that operation of the mine track by the Central or the Power Company is undertaken.*

(The contracts since the reversal of the order of the Illinois Commission stand without limitation and their legal effect must be construed by this Commission as present existing contracts under which the track with which the connection is sought was constructed, and the character of the track is determined by those contracts and the uses to which it would be devoted under them and under the Constitution and Laws of Illinois and of the United States, so a construction and application of them cannot be evaded or avoided by the Commission.)

Finally, defendant contends that the proposed connection would not be reasonably practicable, that it could not be put in with safety and will not furnish sufficient business to justify the construction and maintenance of same. Defendant maintains that, as there now exists a connection with the Central at Eldorado, over which any traffic offered by complainant for movement to a point on or via the defendant's rails would be accepted, the connection here

sought is not *reasonably* practicable. It is asserted that its facilities are being taxed to the utmost during periods of peak business, and that additonal business from this mine would lead to congestion and hinder the service and duty it now owes to shippers along its line. *It is admitted that if the traffic were offered at Eldorado it would be willing to receive it.*

(It is not only asserted by defendant but shown by uncontroverted testimony of Mr. Milligan and Mr. Stevenson that the facilities of the defendant for handling coal in the district between Eldorado and Harrisburg are over-taxed, [fol. 82] and that additional business would require additional facilities and additional equipment, and additional employes to an extent which would render the additional business petitioner might give to the defendant wholly unremunerative; and that the additional traffic could be received through the Eldorado connection under the undisputed testimony of Mr. Milligan without embarrassing or further congesting traffic between Harrisburg and Eldorado is not in any degree inconsistent with the testimony as the proposed report was doubtless intended to indicate (Rec., p. 451).)

The track with which the connection is sought has already been described. Complainant's track is not materially different than any of the others, except possibly with respect to the per cent of grade and degree of curvature. At two places, one of which is toward the south end of the track and north of the traction company crossing, the grades reach a maximum of 1.5 per cent, which defendant considers excessive. At one place in the lead or switch track there is what is called a 9-degree curve, which defendant claims would make operation thereover unsafe. Defendant's witness, however, testified that on the main line of the Cairo division a 9-degree curve exists. Defendant shows that if it delivered a train of thirty-five empty cars over this proposed switch and stopped it 800 feet distant from the power company line, as required by state statute, that the rear end would still be on defendant's main track and thus tend to foul it. There is nothing in the record, however, to show why it would be necessary to delivery thirty-five empty cars over this switch track in one

cut. There are now four switch tracks leading to coal mines connected with this track, and defendant claims that an ad- [fol. 83] ditional connection would materially increase the hazard of operation. To deny the fact that additional switches to any track will increase the hazard of operating over the track would be superfluous, but the addition of the proposed switch does not appear to be so disproportionate as to preclude it on that ground.

(This curve on the main line is south of Carrier Mills where the road extends through the Ozark mountains and there are about two freight trains a day each way composed of less than one-fourth of the tonnage that is regularly handled in trains from Harrisburg to Danville; and in view of the testimony showing that this mine would require from fifty to seventy cars per day and the additional overhead and equipment necessary to care for the business would deprive the respondent of any net return for the service, the record shows ample reason for trains of more than thirty-fire cars per day to avoid the expense of a double service to this mine.)

In Imperial Wheel Company v. St. L. I. M. & S. Ry., 20 I. C. C. 59, the Commission said: "If the prerequisite statutory condition exist the connections must be made whether desired by the carrier or not." In Schlicher v. Director General, 62 I. C. C. 187, the Commission said: "But as construed by us in several cases, the shipper must construct his sidetrack before the carrier is obligated to grant him the switch connection."

(The prerequisite statutory provisions cannot be provided by constructing a connecting railway to be operated as this track is to be operated in violation of both the laws of Illinois and of the United States, but the track must be one which the proposed shipper may with the location of his plant lawfully construct, maintain and operate.) [fol. 84] The Commission should find that complainant's siding has been constructed, that application in writing has been made by complainant for a switch connection therewith and that interstate traffic has been tendered by complainant within the meaning of section 1 of the act; also that there is sufficient business to justify the construction and maintenance of the proposed connection. The Com-

mission should further find that the proposed connection is "reasonably practicable and can be put in with safety." No finding or order with reference to alleged damages sustained should be made, without prejudice to complainant to pursue such remedy as it may have in a court of competent jurisdiction.

XIV

Proceedings Before Commission.—That said cause was heard upon said exceptions February 7, 1925, and a report and order was filed and decision made thereon in the words and figures of Exhibit VI for greater certainty hereto attached and made a part of this Bill; that the said report does not materially vary from the report of the said Director, but is in effect an affirmance thereof; that thereafter on March 27, 1925, this petitioner filed with the Interstate Commerce Commission a petition for a rehearing in said cause which was allowed and the said cause argued on rehearing July 8, 1925, submitted July 29, 1925, and decided March 1, 1926; that said report and final decision herein is for greater certainty hereto attached market Exhibit VII, and made a part hereof: that [fol. 85] in the meantime, during the pendency of said cause before the said Commission, and prior to a decision thereof the decision and opinion of the Supreme Court of Illinois in cases Nos. 12,819 and 12,891 consolidated before the Illinois Commerce Commission, involving precisely the same questions as here involved and submitted upon substantially the same facts, became final and was cited to said Commission on said rehearing, which decision of the Supreme Court established the law of Illinois as hereinbefore stated. Still, the said Commission adhered in substance to the report of Director Bartel, and in addition thereto said: "The Supreme Court of Illinois is charged with the duty of construing laws of the State of Illinois. Under the laws of that State a private track becomes a public track if it crosses a public highway. However, the laws of Illinois and the decision of the Supreme Court of that State in no way affect the character and use of this track in so far as Interstate Commerce is concerned. We must assume that even though the contract between the complainant, the Illinois Central and the Traction Company are sufficient to

give either of those carries the right to handle traffic in Interstate Commerce over this track for the public generally the fact remains that before either of those carriers could exercise such right it would be necessary to first obtain from us a certificate of public convenience and necessity as provided in Paragraph 18 of Section 1, of the Interstate Commerce Act. We have issued no such certificates. It follows that as to interstate commerce no carrier has the [fol. 86] right to operate over this track which would change its character from a private track to a public track. We, of course, are not concerned with the character of the track with respect to intrastate commerce." that this part of the decision and finding of the Interstate Commerce Commission bears upon its face this inherent defect. It assumes that said track as constructed is a private track, whereas, the character of the track is established within the jurisdiction of the courts of Illinois to be a public track; it also appears that said Commission recognizes by this holding that if said track were operated in Interstate Commerce it would be within the provisions of Paragraph 18, Section 1, of the Interstate Commerce Act requiring a certificate of public convenience and necessity, thereby ignoring the provisions of that section which require a certificate of public convenience and necessity before such a track shall be constructed, forbidding the construction that the manner of its operation shall determine its character, the language of the statute being:

"No carrier by railroad subject to this act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad or extension thereof, or shall engage in transportation under this act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity required or will require the construction or operation, or construction and operation of such additional or extended line of railroad." (Section 18-22 of the Transportation Act.)

[fol. 87] XV

The Contentions of Petitioner as to the Law.—The petitioner states and avers that the law applicable to the facts hereinbefore stated is as follows:

(1) That as to the law of Illinois the decision and judgment of the Supreme Court of Illinois is absolutely conclusive and estopped the complainant from averring contrary thereto, and the Interstate Commerce Commission from finding contrary thereto upon the following matters:

(a) That the track in controversy is not a side, spur, or industrial track;

(b) That it is a connecting railway between two railways, and if constructed would pass through new territory and be in extension of all the railways with which it is to be connected;

(c) That when constructed said track would be a public railway track within the meaning of the constitution and laws of Illinois and not a private track;

(d) That the Dering Coal Company is not an industry on the line of railway of petitioner entitled to have a railway connection as proposed between its industry located on the Illinois Central and the railway of petitioner;

(e) That there is an adequate connection by rail from the plant of the Dering Company on the Illinois Central with the railway of the petitioner through and over which the [fol. 88] Dering Company has reasonable access to all markets on the railway of petitioner;

(f) That the Dering Company is in the same situation with respect to rates and services as all other shippers in the territory of Eldorado—Harrisburg, and if there is any lack of proper rate adjustment the same can be obtained by application to the Illinois Commerce Commission and the Interstate Commerce Commission, but that the Dering Company has made no complaint of either rates or service to any proper authority;

(g) That the Dering Company has no power or authority under its charter to construct, own, maintain, lease or operate the proposed track;

(h) That neither the Illinois Central nor the Southern Illinois Railway and Power Company would have any right to construct, maintain or operate the proposed track without a certificate of convenience and necessity from the Illinois Commerce Commission if the same is a private spur-track as alleged by the Dering Company.

(2) That under the provisions of the Interstate Commerce Law neither the Dering Company nor the Illinois Railroad Company had any right, power or authority to begin the construction of said track without a certificate of public convenience and necessity, and that in doing so it violated the law and subjected itself to the penalties pro- [fol. 89] vided by Paragarph 20, Section 400, of the Transportation Act. (41 Stat. at L. 478.)

(3) That in the enactment of Paragraphs 18-22, of Section 400 of the Transportation Act of 1920, Paragraph (g) of Section 1, of the Interstate Commerce Act, was so amended that the construction, maintenance and operation of private, spur, side and industrial tracks was left exclusively within the jurisdiction of State commissions and States courts, and the construction, maintenance and operation of extensions of main lines of railway or public railway tracks into new territory is vested exclusively within the jurisdiction of the Interstate Commerce Commission and the Courts of the United States.

(4) That under a proper construction of said paragraphs 18-22, the track in controversy is an extension into new territory of the railways with which the same is connected, would be a new railway and is within the prohibition of said sections to construct, maintain or operate such a track without a previous certificate of public convenience and necessity from the Interstate Commerce Commission.

(5) That said paragraphs 18-22, were designed to prevent the construction of such a track for competitive purposes as the complaint and proofs of the Dering Company contained in said record show was the object and purpose

of its proceeding both before the Illinois Commerce Commission and the Interstate Commerce Commission.

[fol. 90] (6) That if said track is such a track as the Petitioner contends, merely a mine lead track from its mine to the railway of Petitioner, then it could not be constructed without a certificate of public convenience from the Illinois Commerce Commission and is an unlawful track constructed in violation of Section 55 of the Public Utilities Act of Illinois, and subjected the Illinois Central and the Dering Company to the penalties of the Public Utilities Act for constructing the same without a certificate of public convenience and necessity as required by Section 55 of the Illinois Commerce Act.

XVI

Threat to Use Track and Damages if Temporary Injunction is Not Granted.—The Petitioner shows to the Court that the said defendants, since the construction of the track in controversy, have been using the same for the storage of cars and in connection with the operation of the mine of the Dering Company and the railway of the Illinois Central Railroad Company; that the said defendants threaten to, and as your Petitioner believes will, unless restrained by this Honorable Court, upon and after the effective date of the order of the Interstate Commerce Commission as aforesaid, namely, May 4, 1926, connect said track with the rails of your Petitioner and take steps to enforce the penalties of the Interstate Commerce Act against your Petitioner; that the connection of said track would result in great and irreparable loss and injury to the business of your Petitioner, as your Petitioner believes [fol. 91] in a sum vastly in excess of Two Thousand ($2,000.00) Dollars in the connection of said track and in a much larger sum in the interruption and interference of the business of your Petitioner in the operation of its railroad, and in the movement of cars and trains upon the railway tracks with which it is proposed to connect the said track; that said track was unlawfully constructed and neither under the laws of the State of Illinois or of the United States does the said Dering Company or the said other Defendants have the right to maintain, use or operate said track.

XVII

Prayer of Bill.—The Petitioner prays that upon a final hearing of this cause, that it be ordered and decreed that the said order of the Interstate Commerce Commission entered herein in Docket No. 15552 on February 7, 1925, and since affirmed as aforesaid, be set aside, held for naught, and declared void; that the said defendants be perpetually restrained from constructing, maintaining, operating or using the said track and that the said track be held to be unlawfully constructed without any right or title in any or either of the said defendants to use the same, and that this Court may give by its decree such other general relief as the Court may deem just and equitable;

That your Petitioner may have an order of this Honorable Court requiring the said defendants, United States, J. K. Dering Coal Company, Illinois Central Railroad Company, and Southern Illinois Railway and Power Com-[fol. 92] pany and each of them to jointly and severally answer the allegations of this Bill, but not under oath, the oath being hereby waived.

That summons may issue in accordance with the rules and practices of this Honorable Court, commanding the said defendants to appear and answer this Bill.

That upon a preliminary hearing hereof that this Honorable Court may enter a preliminary order restraining the said defendants from enforcing the provisions of said order of the Interstate Commerce Commission in Docket No. 15,552 of February 7, 1925, and all other orders entered therein until there shall be a final determination of the issues herein by the decree of this Honorabl- Court.

Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., Plaintiff, Petitioner. H. M. Quigley, 9th & Sycamore, Cincinnati, Ohio; C. P. Stewart, Cincinnati, Ohio; D. P. Connell, La Salle St. Station, Chicago, Ill.; Geo. B. Gillespie, 504 Rusch Bldg., Springfield, Ill., Solicitors for Plaintiff.

[fol. 93] *Duly sworn to by Geo. B. Gillespie. Jurat omitted in printing*

[fol. 94] EXHIBIT NO. 1 TO BILL OF COMPLAINT

Copy

Ordinance No. 151, City of Eldorado

An ordinance granting to the Southern Illinois Railway and Power Company, a corporation organized under the laws of the State of Illinois, its successors and assigns, the right to construct, lease, maintain, and operate a railway upon and along and across the public highways hereinafter named.

Whereas, Petitions of the owners of the land representing more than one-half of the frontage of the streets or public highways hereinafter named and sought to be used for railroad purposes and of each mile and fraction hereof of said streets measured from the initial points named in such petitions, has been as required by law presented to the City Council and filed with the City Clerk of the City of Eldorado, Saline County, Illinois, petitioning the City Council of said City to grant by Ordinance to the Southern Illinois Railway and Power Company, a Corporation, its successors, lessees and assigns, consent, permission and authority to locate, construct, maintain, lease and operate a railroad upon and along said hereinafter named public highways.

Now, Therefore, Be it Ordained By the City Council of the City of Eldorado, Saline County, Illinois:

Section 1. That right, permission and authority are hereby granted said Southern Illinois Railway and Power Company, its successors, lessees and assigns, to construct, lease, maintain and operate a single or double track railway together with all necessary or convenient sidings, turnouts, spurs, curves and connections with any original or future line of grantee, and also all necessary or convenient equipment, appliances and appurtenances for said railway in, upon, over and along the surface of the following described public highways in the City of Eldorado, Saline County, Illinois, namely: All that part of Locust Street lying East of the East paving curb line of Fifth Street; and all that part of Union Street lying East of said curb line, produced, and West of the Right-of-way of the "Y"

connecting the Louisville and Nashville Railroad with the Cleveland, Cincinnati, Chicago and St. Louis Railway all in the City of Eldorado, County of Saline and State of Illinois.

Section 2. Grantee hereby is empowered and expressly authorized to operate said railway by electricity as motive power or any other motive power except steam locomotive engine, provided, however, that during the course of [fol. 95] construction of the railroad of grantee on, over and along said street, the grantee may use steam locomotive engine as motive power to operate said railroad, or any part thereof.

Section 3. Grantee is hereby expressly granted the right and authority to erect and maintain in and upon said public highway on the sidewalk side of the curb line necessary and suitable wooden poles and to string and maintain thereon or therefrom, span, transmission feed trolley and other wires for the convenience of electricity for power, light, heat and other purposes, also telegraph, telephone and other wires necessary to be used in connection with the operation of the said railway only. No pole, wire or other appliance or appurtenance shall be so located, placed or maintained as to interfere with, or obstruct travel, light or air. The trolley wires of grantee shall be suspended not less than substantially sixteen (16) feet (except where overhead obstructions are present) above the rails of said railway, and no other wires or other like appliance shall be suspended lower than such trolley wires. And no other person or company thereafter shall place any wires below the wires of the grantee in such a way as to obstruct the practical operation of said railway.

Section 4. If at any time during the term of this franchise that portion of Union Street covered by this Ordinance should be widened to forty feet or more in width, then the Grantee hereby is expressly authorized at any time thereafter during the term of this Ordinance to double track any portion or portions of said Railway which then may be single tracked. All single track shall be placed as nearly as practicable on the center line of the street and equidistant from the respective sides of the street; and all double tracks shall be placed equi-distant and as near to the center line of the street as the practical operation of the

said Railway will permit; it being expressly understood, however, that no double track, is to be placed upon the said portion of Union Street until the same has been widened to at least forty feet or more in width.

Section 5. The tracks of the said Railway shall be of tee rail, so laid and maintained that the tops of the rails thereof shall, at all times, as far as practicable, be level with and conform to the grade of said highway as the same is now or hereafter may be established; and the grantee shall at all times keep said railway tracks so filled and ballasted on both sides of the rails as not unnecessarily to interfere with the use of said highway for the passage of vehicles across said tracks.

[fol. 96] Section 6. Grantee hereby is expressly authorized at any time during the term of this Ordinance to cross at grade any and all existing or future lines of railway or track in said city and to construct wyes, curves and connections to and with any such lines of railways or tracks.

Section 7. Cars may be operated upon said railway so constructed upon said street at the speed of ten (10) miles per hour schedule time.

Section 8. The cars of grantee at all times shall be entitled to the right of way of said tracks and whenever any car or cars are approaching, any vehicle or person on foot upon said tracks, shall turn out so as not to impede or interfere with the speed or operation of said car or cars. Any person wantonly impeding or interfering with the speed or operation of any car or cars of grantee upon the said Railway; shall, upon conviction thereof, be fined not less than One (1) Dollar nor more than One Hundred (100) Dollars for each offense.

Section 9. Grantee is hereby granted the right and authorized to operate passenger, express, mail and freight cars, singly or in train of not to exceed twelve (12) cars, exclusive of the motor or pulling car, for the carriage or transportation of passengers, baggage, freight, express and United States Mail. All cars shall be neat in appearance; and freight, mail and express shall be transported only in closed cars, except coal; and no coal shall be transported or hauled over said railway within said City except be-

tween the hours of ten (10) o'clock P. M. and six (6) o'clock A. M., in the night time.

Section 10. The rate of fare during the term of this ordinance for a single continuous passage in the same general direction over the railway of grantee, within the present corporate limits of said City shall be five (5) cents for each person of twelve (12) years of age or over, and three (3) cents for each person under twelve (12) years of age. Provided that a child under the age of six (6) years when accompanied by an adult person paying regular fare, shall be permitted to ride free.

Section 11. No special assessment, tax or charge for paving or like improvement, or any imposition, burden or charge in connection therewith shall during the term of this ordinance be assessed, levied, charged against, imposed upon, collected from, or required to be paid or performed or done by the grantee, except that the grantee shall within one year from the date of the granting of this franchise pave that portion of said Locust and Union Streets so sought to be occupied with paving of the same character [fol. 97] as is now laid in said City on the adjacent portion of Locust street; the said paving shall cover the entire roadway of said portions of said streets from curb line to curb line, the curbing on the North line of said streets shall be set in a line five feet South of and parallel with the South line of Block Three (3) of Cox & Organ's Addition, and the curbing on the South side shall be set on a line produced, of curbing already placed on the South side of Locust Street to the point where said line intersects on the curb line on South side of Union Street, the curbing on the South side of Union Street shall be set Twenty-two (22) feet South of the North curb and parallel with the North line of Block Thirteen of East Eldorado, in said City; and the said Grantee shall maintain the pavement between the outer rails of its tracks and one foot on the outside of said rails.

The grantee shall at all times at its own expense place sewers, sluice-ways and culverts under and cross its track ways at all proper places, this not to include sanitary sewers, so as not to hinder the free flow of surface water in its natural or usual course.

The grantee further agrees to repair and reconstruct all sidewalks, crossings and streets which may in any manner

be destroyed in whole or in part by it in the construction, operation, repair and maintenance of its said railroad.

Section 12. No car license, fee, tax or charge; pole, or pole line license, tax or charge, or any other fee or license whatsoever, shall be levied, assessed against, imposed upon or collected from the grantee during the term of this ordinance, but the grantee shall be exempt from such, and from payment or performance of any or all thereof; all as far as is not in conflict with law.

Section 13. Grantee shall at all times save harmless, protect and indemnify said City from any and all liability for damages due to or arising by reason of the location, construction, maintenance and operation of said railway, or any pole, span, feed or transmission wire, or other appliance, appurtenance, or thing belonging to said Railway.

Section 14. The grantee shall construct its said railway upon that portion of Union Street and Locust Street covered by this franchise within one year from the date of the passage of this Ordinance.

Section 15. The word "Grantee" whenever used in this Ordinance shall be held to mean and include said Southern Illinois Railway and Power Company, its successors, lessees [fol. 98] or assigns, and any and all persons, Companies or Corporations claiming by, through or under it, them or either of them.

Section 16. It is not the intention of the City Council by this Ordinance to surrender or delegate any of the powers or control of the said City over the said streets and alleys and public places mentioned in this Ordinance, nor any of its powers in relation to the regulation and control of any railway, except as may be expressly surrendered or delegated by this ordinance.

Section 17. Within thirty (30) days after the final passage of this ordinance, grantee shall file with the Clerk of said City its written acceptance of the terms and provisions hereon, and when so accepted, this ordinance shall be binding upon said Southern Illinois Railway and Power Co., its successors and assigns, and said City of Eldorado as a contract.

Section 18. The rights, privileges and authority herein and hereby granted said Southern Illinois Railway and Power Co., its successors and assigns shall extend for and during the term of fifty (50) years from July 1, 1912.

Section 19. This ordinance shall be in full force and effect from and after its final passage, approval and acceptance as herein provided and due publication.

Passed by the City Council of the City of Eldorado, Saline County, Illinois, this 15th day of October A. D. 1913.

Sam W. Latham, Mayor of the City of Eldorado, Saline County, Illinois.

Attest: R. S. Martin, Clerk of the City of Eldorado, Saline County, Illinois. (Seal.)

Recommended by the Ordinance Committee. —— ——.

Recorded by me this 18th day of June A. D. 1920. —— ——.

[fol. 99] State of Illinois,
County of Saline,
City of Eldorado, ss:

I, Roscoe Colbert, of the aforesaid City, County and State, do hereby certify that I am the duly elected, qualified, and acting City Clerk of the aforesaid City of Eldorado, aforesaid County and State, and the Keeper of the records and files of said office, do hereby certify that I have compared the above and foregoing copy of "An Ordinance granting to the Southern Illinois Railway and Power Company, a corporation, organized under the laws of the State of Illinois, its successors, and assigns, the right to construct, lease, maintain and operate a Railway upon and along and across the public highways * * *" of the said City of Eldorado, Illinois, with the original records of the same in this office remaining, and also with the original now on file in this office, and which are lawfully in my custody, and that the same is a true, exact and literal copy of the same now in my office remaining.

In witness whereof I have hereunto set my hand and affixed the seal of said City of Eldorado, Illinois, of which

I have the custody thereof, at my office, in the City of Eldorado, in said County of Saline and State of Illinois, this the 19th day of March, A. D. 1926.

Roscoe Colbert, City Clerk of the City of Eldorado, Saline County, Illinois.

[fol. 100] EXHIBIT No. 2 TO BILL OF COMPLAINT

No. 10945

DERING MINES COMPANY et al.

v.

DIRECTOR GENERAL, ILLINOIS CENTRAL RAILROAD COMPANY, et al.

Submitted October 13, 1920. Decided June 17, 1921

1. The defendants' failure to accord a joint status to complainants' mines located on their rails near Eldorado, Illinois, held not to result in unjust discrimination against or undue prejudice to complainants.

2. Defendant's rates on coal from complainant's mines to interstate destinations not shown to be unreasonable, unjustly discriminatory or unduly prejudicial.

3. Complaint dismissed.

Clarence B. Cardy for complainants.

R. W. Ropiequet for Gallatin Coal and Coke Company, intervener.

C. P. Stewart and D. P. Connell for Director General and Cleveland, Cincinati, Chicago & St. Louis Railway Company; and John G. Drennan for Director General and Illinois Central Railroad Company.

Report of the Commission

Division 5, Commissioners Clark, Aitchison, and Potter.

POTTER, Commissioner:

The issues here presented were made the subject of a proposed report by the Examiner. Exceptions were filed on behalf of defendant carriers and oral argument has been had thereon.

As used herein, the term "local mine" means a mine situated on and served by only one railroad; the term "joint mine" means a mine situated on one railroad, but actually served by one or more additional carriers under trackage agreements or switching absorption arrangements; and the term "junction-point mine" means a mine served by two or more railroads with their own rails.

The Illinois Central operates an east and west line whose eastern terminus is Eldorado, Illinois, in the Southern Illinois coal group, at which point it connects with a line of the Cleveland, Cincinnati, Chicago & St. Louis Railway, [fol. 101] hereinafter referred to as the Big Four, running in a northeasterly and southwesterly direction.

The complainants operate two local mines, the Dering Mine No. 3, situated on the Big Four, 0.8 mile northeast of Eldorado, and the J. K. Dering Coal Company Mine No. 2, situated on the Illinois Central railroad, 2.5 miles west of Eldorado. The complainants ask that the Illinois Central shall serve the mine on the Big Four, and that the Big Four shall serve the mine on the Illinois Ceatral, under trackage agreements or switching absorption arrangements, and thereby make their mines joint mines. It is alleged that the failure of the defendants so to do results in unjust discrimination and undue prejudice in connection with the service rendered to complainants' mines, as compared with joint mines, and that the coal rates applicable from complainants' mines are unreasonable, unjustly discriminatory and unduly prejudicial.

The advantages which would accrue to the complainants if they should prevail would be a better car supply in times of car shortage, due to the opportunity they would then have to draw cars from both lines; and additional route to Chicago and other points reached by both lines, and access by each mine to local markets on both lines instead of only the local markets on its one line, as at present. The latter is illustrated in this way: The Dering Mine No. 3, on the Big Four, in shipping to local points on the Illinois Central would now pay the group rate from Eldorado, plus the local distance tariff rate of the Big Four to Eldorado. The latter charge would be eliminated under the complainants' proposed plan. The benefit chiefly sought by complainants, however, is better car supply to the joint mine in times of

car shortage. The record shows that the joint mine has an advantage in this respect.

The Big Four assumed the burden of the defense of this case. It is strongly opposed to permitting the Illinois Central to reach the complaining mine on its line or to extending its service to the complaining mine located on the Illinois Central. It was testified for the Big Four that it has expended large sums of money in improving its facilities and providing equipment for handling coal traffic in the Southern Illinois coal field, and that it desires to use its equipment and facilities in the service of shippers to whom it is already under an obligation to furnish transportation. It was further suggested that if it allows the Illinois Central to reach the complaining mine on its line it would be unable successfully to resist claims for similar treatment of other mines which it serves in the same general territory [fol. 102] and which produce a large coal tonnage; and that in return for traffic lost to the Illinois Central it would get substantially nothing from that road.

An exhibit introduced by complainant shows nineteen mines in the Southern Illinois group, four mines in the Springfield district, and one mine in the Danville district, some of which are served by two or more lines direct, and all of which are said to be served by one or more lines in addition to those upon whose rails they are located, by trackage agreements or switching absorption arrangements.

It is stated that the Big Four participates in arrangements under which two of the mines shown in the Southern Illinois group and all of the mines shown in the Springfield and Danville districts are given a joint status. One of the two mines in the Southern Illinois group, located about 2.75 miles south of Eldorado on the Louisville & Nashville, is served by the Big Four under a trackage agreement, the mine reimbursing the Big Four for payments which it has to make to the Louisville & Nashville, under the agreement; and the other, located at Eldorado, is reached direct by the tracks of the Big Four and the Illinois Central, but for convenience and economy of operation the two roads have an arrangement whereby the Illinois Central tracks are used for placing all empty cars at the mine and the Big Four tracks are used for taking all loaded cars out. Three of the mines in the Springfield district are served by a joint

track of the Big Four and the Chicago & Eastern Illinois extending from Pana to Granite City, Ill. The other mine in this district, which is near Hillsboro, Ill., is served by the Big Four's own rails. That road formerly published a switching charge from the mine to the connection of the Big Four's track with the joint track of the Chicago & Eastern Illinois and Big Four at Hillsboro, which charge was absorbed by the Chicago & Eastern Illinois. Since the hearing this switching charge has been canceled and the resulting situation is now before us in another proceeding, No. 11,674. The mine in the Danville district is served by the Big Four under a trackage agreement with the Chicago & Eastern Illinois. It will, therefore, be seen that in each instance shown, where the Big Four now participates in an arrangement for according a mine a joint status, it is done under a trackage agreement.

This case, in so far as the question of joint service is concerned, is controlled by the principles announced in Ridge Coal Mining Co. v. M. P. R. R. Co., 62 I. C. C., 259. We there [fol. 103] found, in substance, that the service of a mine by a carrier under a trackage agreement is, in practical and legal effect, the substantial equivalent of an extension of its rails to the mine; that a mine which is accorded a joint status by means of a trackage agreement is in the same category as a junction-joint mine, and that, generally speaking, a carrier is not chargeable with undue prejudice because it extends its service to certain mines, either by extensions of its rails or under trackage agreements, thereby giving them the advantages of a joint or junction-point status, while declining to make other extensions or trackage agreements to extend its service to other mines. We recognized that there might be certain exceptions to these general principles, but no exceptional circumstances are here presented.

Following the case cited, and upon this record, we are of opinion and find that the refusal of the Big Four to participate in arrangements whereby the services and facilities of the Illinois Central and the Big Four will be available to the complaining mines does not result in undue prejudice to them. As the Big Four is a necessary party to such an arrangement at either of the complaining mines, it will not be necessary to discuss the situation on the Illinois Central.

The complaint contains an attack upon the rates applicable from complainants' mines, growing out of the fact that coal shipped from the mine on either the Illinois Central or the Big Four, via the line of the other road to local or common points, must pay the local rate of the originating line to the junction point plus the group rate applicable via the other line beyond. Each of the complaining mines now has the benefit of the group rates on shipments via the line on which it is located. Substantially the only evidence offered by the complainants in support of the allegation of unreasonableness consisted of comparisons of the combination rates applicable on shipments from each of their mines when moving over both the Illinois Central and the Big Four with the group rates applicable on shipments from joint mines when moving via lines which do not reach the mines with their own rails, but which serve them under trackage agreements. In view of the difference in the situation of joint mines and local mines which we have recognized herein, and our denial of complainants' prayer that their mines be made joint mines, such comparisons are not helpful. It appears to be the general practice of roads serving the Illinois coal fields to restrict the application of their group rates on coal to points which they serve either [fol. 104] directly or as joint mines, and to require coal originating on other lines to pay the rate of the originating line to the junction point, in addition to the group rate. In the absence of a showing that the complaining mines are entitled to joint rates, the record affords no basis for condemning rates made in accordance with the present practice, and there is no evidence that either component of the combination rates applicable from the complaining mines is unreasonable.

We find that defendants' rates on coal from complainants' mines are not shown to be unreasonable, unjustly discriminatory or unduly prejudicial.

It developed in this case that the trackage agreements hereinbefore referred to had not been filed with us, as required by paragraph 5 of Section 6 of the Interstate Commerce Act.

An order will be entered dismissing the complaint.

[fol. 105] EXHIBIT No. 3 TO BILL OF COMPLAINT

BEFORE THE ILLINOIS COMMERCE COMMISSION, STATE OF ILLINOIS

Petition No. 12819

J. K. DERING COAL CO.

v.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY

Petition of J. K. Dering Coal Co. for a switch connection with the rails of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and the rails of the mine track of the J. K. Dering Coal Co. in Saline County, Illinois.

The petition of the above named complainant respectfully shows:

1. The complainant, J. K. Dering Coal Co., is a corporation duly orangized and existing under the laws of the State of Illinois for the purpose, among other things of conducting the business of producing and selling Bituminous Coal.

2. That the defendant, Cleveland, Cincinnati, Chicago and St. Louis Railway Company, is a common carrier engaged in the transporting of passengers and property for hire by railroad between points in the State of Illinois and is daily engaged in the business of transporting Bituminous coal from various coal mines located upon, along and adjacent to its line of railroad in Saline County, Illinois, to various points upon its rails to junctions with other common carriers in the State of Illinois and, as such common carrier, is subject to the provisions of the Act of the Legislature of the State of Illinois entitled "An Act concerning Public Utilities," approved June 29, 1921, in force July 1, 1921.

3. That the complainant owns and operates a coal mine located about two (2) miles north of railroad tracks and right of way of the Defendant, Cleveland, Cincinnati, Chicago and St. Louis Railway Company in Saline County,

Illinois; that said mine has been in actual operation for over three and one-half (3½) years, is constructed for and capable of producing more than three thousand five hundred (3,500) tons of Bituminous coal per day; that said complainant owns three thousand five hundred and six (3,506) acres of coal and mineral rights containing more [fol. 106] than twenty-one million, thirty-six thousand (21,036,000) tons of bituminous coal, which is especially adapted for domestic use; that complainant daily produces a large volume of Bituminous coal and has on hand, at all times, coal for shipment to various points located upon the line of the defendant and connecting carriers of the defendant, in the State of Illinois; that the complainant desires to deliver car loads of bituminous coal produced at said mine to the said defendant for shipment over its line of railroad to various points in the State of Illinois and contemplates the construction of a railroad switch track from its said mine to the right of way and railroad track of the defendant for the purpose of delivering said coal to the defendant for shipment as aforesaid; that the track proposed to be constructed, from the mine of the complainant to the railroad right of way and tracks of the defendant, is shown in red on the blue prints hereto attached and marked "Exhibit 'A' ", and made a part of this petition; that said defendant has made arrangements for the acquisition of a right of way fifty (50) feet wide, upon which is to be constructed said proposed track; that complainant has heretofore made application to this Honorable Commission for permission to construct said switch track across the line of the Illinois Central Railroad Company and the line of the railroad of the Southern Illinois Railway and Power Company as well as over the highway crossings traversed by said proposed track and that this Commission, on, to-wit: the 14th day of December, 1922, granted the complainant permission to construct said mine track over and across the railway tracks and highways herein referred to; that said complainant is able, ready and willing to construct said mine track and maintain it in a safe condition for operation.

Your complainant further represents that it has made repeated application to the defendant for a switch connection

with its rails for a connection between the railroad of the said defendant and the contemplated track of the complainant and to provide the necessary switches and tracks as may be necessary for the purpose of delivering to the defendant car loads of bituminous coal at the point shown on said blue print hereto attached at the place where the switch track of the complainant adjoins the right of way of the defendant, and that the complainant offered to make any fair and reasonable arrangement for the expense of construction and maintenance of such switch connection but that said defendant refuses to construct such connection or permit the complainant to connect its said switch track [fol. 107] with track of said defendant; that the connection and switch track contemplated and proposed are reasonable, and practicable and can be installed and used without materially increasing the hazard of the operation of the railroad of the defendant; that the business which may reasonably be expected to be received by such defendant from the complainant over said connection will be sufficient to justify the expense of the construction and maintenance of such switch connection by the defendant; that said switch connection with the railroad of said defendant is necessary to transport to destination coal produced at the mine of the complainant to said points of destination and that without such switch connection the complainant will be unable to produce and ship the amount of coal that is necessary to supply its customers; that the complainant proposes to acquire said right of way and construct said switch track from its mine to the right of way of the defendant at its sole cost and expense, which is estimated to be more than Seventy Thousand ($70,000) Dollars; that the legal description of the tract of land and right of way upon which said proposed track is to be constructed, which adjoins the right of way of said defendant, is as follows, to-wit:

Beginning at a point on north right of way line of Cleveland, Cincinnati, Chicago and St. Louis Railway where the land line running east and west, through center of Section Thirty-six (36) crosses said right of way line and measure west on said line One Hundred Sixty-one (161) feet, thence southwesterly Two Hundred Thirty-eight (238) feet to north right of way line of Cleveland, Cincinnati, Chicago and St. Louis Railway; thence northeasterly along

said right of way line Three Hundred Twenty-four (324) feet to place of beginning all in the Northwest Quarter (¼) Southeast Quarter (¼) Section Thirty-six (36) Township Eight (8) South, Range (6) East.

That the complainant is able, ready and willing to pay the defendant the just and reasonable charges for the movement of freight shipped by it over the line of the defendant and connecting carriers and is able, ready and willing to make such fair and reasonable arrangement for the payment of the expense of the construction and maintenance of a switch connection with the rails of the defendant as to this commission may seem just and reasonable.

That the complainant is able, ready and willing, upon the completion of said proposed switch track and connection, to ship a large volume of the bituminous coal produced at its [fol. 108] said mine over the line of the defendant and connecting carriers to points in Illinois;

Therefore, complainant avers that the refusal of the defendant to put in a switch connection for the service of the complainant, at the point above referred to is arbitrary and unlawful.

Wherefore the complainant prays that the defendant may be required to answer the charges herein; that after due hearing and investigation, an order be made by this Honorable Commission commanding the defendant to construct, maintain and operate upon its own right of way, at or near the point of connection shown upon said blueprint and upon the tract of land heretofore described in the above paragraph, in Saline County, Illinois, a switch track connecting the proposed track of the complainant with the tracks of the defendant hereinbefore described and that such connection and connecting track be constructed and maintained on such terms and under such conditions as this Honorable Commission may deem just and proper and that such other and further order may be made in the premises as to the Commission may appear proper.

J. K. Dering Coal Company, by James B. Pauley. Vice-President. Clarence B. Cardy, Attorney for Complainant, Room 1920, McCormick Bldg., Chicago, Illinois.

[fol. 109] EXHIBIT No. 4 TO BILL OF COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

J. K. DERING COAL CO., Complainant,

v.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Defendant

Petition for a Switch connection with the Rails of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and the Rails of the Mine Track of the J. K. Dering Coal Co. in Saline County, Illinois.

The petition of the above named complainant respectfully shows:

1. The complainant, J. K. Dering Coal Co., is a corporation duly organized and existing under the laws of the State of Illinois for the purpose, among other things of conducting the business of producing and selling bituminous coal, with principal office located at 1914 McCormick Building, Chicago, Illinois.

2. That the defendant, Cleveland, Cincinnati, Chicago and St. Louis Railway Company, is a common carrier engaged in the transporting of passengers and property for hire by railroad between points in the State of Illinois and others states, and as such common carrier is subject to the provisions of the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof and supplemental thereto.

3. That the complainant owns and operates a coal mine located about two (2) miles west of railroad tracks and right of way of the defendant, Cleveland, Cincinnati, Chicago and St. Louis Railway Company in Saline County, Illinois; that said mine is constructed for and capable of producing more than three thousand five hundred (3,500) tons of bituminous coal per day; that said complainant owns three thousand, five hundred and six (3,506) acres of coal and mineral rights containing more than twenty-one million, thirty-six thousand (21,036,000) tons of bituminous coal, which is especially adapted for domestic use;

that complainant daily produces a large volume of bituminous coal and has on hand, at all times, coal for shipment to various points located upon the line of the defendant and connecting carriers of the defendant, in the States of [fol. 110] Illinois, Indiana, Iowa, Wisconsin and other states; that the complainant desires to deliver carloads of bituminous coal produced at said mine to the said defendant for shipment over its line of railroad to various points of destination outside of the State of Illinois and has constructed a railroad switch track from its said mine to the right of way and railroad track of the defendant for the purpose of delivering said coal to the defendant for shipment as aforesaid; that the track constructed, from the mine of the complainant to the railroad right of way and tracks of the defendant, is shown in red on the plat hereto atached and marked "Exhibit A," and made a part of this petition; that the cost of the right of way and construction of said track to the complainant was, to-wit, $100,000.

4. Your complainant further shows that it has heretofore made written application to the defendant for a switch connection between the railroad of the said defendant and the switch track of the complainant requesting that the defendant provide such connection, switches and tracks as may be required for the purpose of delivering to the defendant carloads of bituminous coal for shipment in interstate commerce at the point where the switch tracks of the complainant adjoins the right of way and tracks of the defendant, and that the complainant has offered to make any fair and reasonable arrangement for the expense of the construction and maintenance of such switch connection. Your complainant further shows that said defendant refuses to construct, maintain, operate or install such switch connection or permit the complainant to connect its said switch track with track of said defendant; that the defendant refuses to receive and accept for interstate transportation carload freight tendered to it for shipment at said point of connection of the track of the complainant with the tracks of the defendant, and to furnish cars for the movement of such traffic.

Your complainant further represents that said switch track connection is reasonably practicable and can be put in with safety and used without materially increasing the

hazard of the operation of the railroad of the defendant; that the business which may reasonably be expected to be received by such defendant from the complainant over said connection will be sufficient to justify the expense of the construction and maintenance of such switch connection by the defendant; that said switch connection with the railroad of said defendant is necessary to transport to destination [fol. 111] coal produced at the mine of the complainant to said points of destination; that the legal description of the tract of land upon which said mine switch of the complainant is constructed, which adjoins the right of way of said defendant, is as follows, to wit:

A tract of land lying between the tracks of the Southern Illinois Railway and Power Company and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, in the west half of the southwest quarter of Section Thirty-six (36), Township Eight (8) South, Range Six (6) East of the Third Principal Meridian, Saline County, Illinois, more particularly described as follows:

Beginning at a point on west line of said Section thirty-six 643 feet south of the northwest corner of the southwest quarter of the southwest quarter of said Section 36; thence south on said Section line 638 feet to the north right of way line of the said C. C. C. & St. L. Ry. Co.; thence north 49 degrees and 15 minutes east on the north right of way line of the said C. C. C. & St. L. Ry. Co. 1729 feet to a point on the quarter section line between the Southwest Quarter (S. W. 1/4) Southwest Quarter (S. W. 1/4) and the Southeast Quarter (S. E. 1/4) Southwest Quarter of the said Section 36; thence north on the quarter section line 556 feet to a point on the south right of way line of the said Southern Illinois Railway and Power Company right of way; thence south 51 degrees 39 minutes west along the said south right of way line of the said Southern Illinois Railway and Power Company right of way 1675 feet to the point of beginning, containing 17.86 acres, more or less.

Your complainant further represents that it is desirous of shipping a large volume of bituminous coal produced at its said mine over the line of the defendant to points in Illinois, Indiana, Iowa, Wisconsin and other states, and it has tendered to the defendant interstate traffic for transporta-

tion, to be received by the defendant over said track and connection; that said defendant has refused to permit complainant to connect its said track with the tracks of the defendant and has failed to install and operate switch connection in order that defendant might deliver to it carload freight for interstate transportation; that said defendant refused to accept said shipments, so tendered to it for transportation in interstate commerce; that said defendant refuses to furnish empty cars for the movement of such traffic to the best of its ability without unjust discrimination in favor of or against the complainant, all of which [fol. 112] is in direct violation of Section 1 of the said Act to Regulate Commerce.

Therefore, complainant avers that the refusal of the defendant to put in a switch connection for the service of the complainant, and to accept interstate traffic for shipment at the point above referred to, is arbitrary and unlawful.

Wherefore, the complainant prays that the defendant may be required to answer the charges herein; that after due hearing and investigation, an order be made by this Honorable Commission commanding the defendant to cease and desist from the aforesaid violations of said Act to Regulate Commerce, and be ordered to construct, maintain and operate upon its own right of way, at the point of connection shown upon said plat marked Exhibit A and upon the tract of land heretofore described in the above paragraph, in Saline County, Illinois, a switch track connecting the said track of the complainant with the tracks of the defendant hereinbefore described and that such connection and connecting track be constructed and maintained under such reasonable terms and conditions as this Honorable Commission may deem just and that the defendant be ordered and directed to accept and transport in interstate commerce shipments of coal tendered and delivered to it over said track and connection; and that the defendant be ordered and directed to furnish cars for the movement of such traffic, to the best of its ability without unjust discrimination in favor of or against the complainant, and also that the Commission shall determine that the complainant is entitled to an award of damages under the provisions of said act for violation thereof and order said defendant

to pay complainant herein by way of reparation all damages sustained by it in this regard from the first day of December, 1923, to the date when the Commission's order shall become effective, and that such other and further order or orders be made as the Commission may consider proper in the premises.

J. K. Dering Coal Co., by James B. Pauley, Vice-President. C. B. Cardy and P. J. Wimsey, Attorneys for Complainant. Room 1920, McCormick Bldg., Chicago, Ill.

January 17, 1923.

[fol. 113] Exhibit No. 5 to Bill of Complaint

Before the Interstate Commerce Commission

J. K. Dering Coal Company, Complainant,

v.

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Defendant

Answer of the Defendant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, to the Complaint of J. K. Dering Coal Company, Complainant

(1) The defendant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, admits that the complainant J. K. Dering Coal Company, is a corporation organized under the General Incorporation Laws of the State of Illinois, and by its charter is authorized to produce and sell coal, but it denies that said coal company has any power or authority under its charter to build, own, operate or lease a railroad, either for its own use or for the use of others or for the transportation of coal from the mine tipple or point of production located on one railway, to a connection with another railway, for any purpose or to accomplish any object; and especially does it not have the right, power or authority under its charter to construct, own or operate such a line of railway to a point distant therefrom and connect the same with another railway for the purpose or with the effect of making or constituting the mine of complainant

an industry on the railway of defendant, and to enable it to demand a supply of cars from defendant.

(2) The defendant admits that it is a common carrier by rail engaged in the transportation of passengers and freight for hire, both in interstate and intrastate commerce, and that in its relations to other common carriers in interstate commerce the public offering passengers and freight for transportation on its railway in interstate commerce as said railway was located and built or at its connections with other railways, to be transported in interstate commerce, it is subject to regulation by the provisions of the Act of Congress of February 4, 1887, as amended; but, as to the complainant having the production point of its mine or mine [fol. 114] tipple located on the Illinois Central Railroad (a common carrier by rail in interstate commerce, whose line directly or indirectly connects with all the interstate railways of the State of Illinois and of the United States as directly as the railway of defendants); the defendant denies that it owes to the complainant the duty under said Act of Congress to permit complainant to build and connect a track from its mines so located or to connect the same with defendant's railway for the sole purpose of constituting complainant's mine an industry on defendant's railway and thereby obtaining an additional car supply. Defendant avers that to accept it to connect with such a track and operate the same by delivering cars thereto and taking cars therefrom and treating the same as an industry on the railway of defendant would, in legal effect, compel the defendant to extend its railway to a point to which its charter, officers and directors have not authorized it to extend same, and that no authority is conferred by said Act of Congress to compel a railway to so extend its track and the exercise of such power would be arbitrary and in violation of the Fourteenth Amendment to the Constitution of the United States in denying to the defendant the equal protection of the law, and would be a taking of its property without due process of law.

(3) The defendant admits that the complainant owns and operates a coal mine located about two and one half miles distant from the railway of the Celveland, Cincinnati, Chicago & St. Louis Railway Company in Saline County, Illi-

nois, and avers that said mine is located upon the Illinois Central Railroad and has adequate track facilities to deliver coal produced therefrom to the railway of defendant through a connection at Eldorado, Illinois; it denies that said mine has a production capacity of more than three thousand five hundred (3,500) tons of bituminous coal per day, or that it has ever produced that much coal per day. It admits that there is in the said tract of land about three thousand five hundred six (3,506) acres of coal or mineral rights, and it neither admits nor denies, but requires strict proof, that there is in said rights twenty-one million thirty-six thousand (21,036,000) tons of bituminous coal, and that such coal is especially adapted for domestic uses. It denies that said coal rights extend to the railway of defendant, and avers that the nearest point of approach thereof to the railway of defendant is approximately one-half mile. It admits that the complainant daily produces a large volume of bituminous coal, but it denies that it keeps or has said coal on hand after it is produced, and avers that as [fol. 115] said coal is produced it is loaded into cars and shipped out on the railway of the Illinois Centarl Railroad Company to various points in the States of Illinois, Indiana, Iowa, Wisconsin and other states. It avers that ninety five (95%) per cent of its production is shipped to Chicago, Illinois, and to points beyond Chicago, and to points local to the Illinois Central Railroad, and avers that all of the production of said mine and all of the coal embraced within the mining rights of complainant have a direct connection through the Illinois Central Railroad with all the interstate railways in said State of Illinois having lines extending into other states, and that it has with respect to all other lines of railway than the Illinois the precise and exact status with reference to rates, facilities and availability of markets on other railways that exists in favor of its competitors located upon the line of the defendant, and all other railways with respect to the availability of them to markets on the Illinois Central; that the complainant's mine, as located on the Illinois Central Railroad, two and one-half miles distant from the connection of the Illinois Central Railroad with the defendant's railway at Eldorado, has available to it the main line of the Illinois Central over which to transport and deliver any shipment of coal it may

desire to transport over the lines of the defendant, and the defendant is ready and willing and offers to accept for transportation all carload shipments of coal from the mines of complainant to any point upon or reached by the railway of the defendant, and offered to it through said connection; that there are no markets on the railway of the defendant to which complainant cannot ship coal at reasonable rates through said connection, and practically all markets of consequence located on the lines of defendant are reached by the lines of the Illinois Central and its connections from the mine of complainant; that not to exceed two (2%) per cent of the total production of complainant's mines could be marketed at markets on the defendant's railway, which are purely local to said railway and not available through other connections at the same or less rates. The defendant neither admits nor denies that the complainant has expended the sum of one hundred thousand ($100,000.00) dollars for the construction of a track from its mine on the Illinois Central to a connection with the railway of defendant at a point about equi-distant between Eldorado and Harrisburg, approximately four and one-half miles from each place, in Saline County, but it denies that the defendant had any right, power or authority [fol. 116] under its charter to build such track, or was authorized by any final order of the Illinois Commerce Commission not appealed from to build such track, but avers that if said track has been built it was built in face of an order of the Circuit Court of Saline County suspending an order of the Illinois Commerce Commission pursuant to law pending an appeal from an order of the Illinois Commerce Commission granting such authority; and at the time said track was built it was well known to the complainant that said appeal had been perfected from the orders of the Illinois Commerce Commission, entered May 5 and May 8, 1923, and that said orders had been suspended pending the hearing of said appeal, and are still suspended; and this defendant denies that the complainant could acquire any right or title either to build said track or have the same connected by reason of the construction thereof in such a situation.

(4) The defendant admits that the complainant made a written application for an alleged switch-track connection between the railway of the defendant and the mine tracks of complainant which constitute a part of the railway of the Illinois Central Railroad, and that the defendant refused to extend its railway to connect with the said mine tracks and the railway of the Illinois Central Railroad Company by permitting the construction and connection of such track with the railway of defendant for the reason that there is an adequate physical connection between the said mine tracks constituting a part of the railway of the Illinois Central Railroad Company and the railway of the defendant by the main line of the Illinois Central Railroad Company extended therefrom to and forming a connection with the railway of defendant at Eldorado, Illinois, and was without lawful authority to extend its road into territory tributary to the Illinois Central or to serve an industry on its line without a certificate of convenience and necessity which could not have lawfully been granted, and the defendant avers that over the existing track the complainant is entitled under the laws of the State of Illinois and of the United States to have transported all carload shipments from its mines to and over the railway of the defendant at just and reasonable rates, and denies that it is or was under any obligation to extend its railway or permit the extension thereof by others from the point selected by complainant equi-distant between Harrisburg and Eldorado to said mine tipple and mine tracks of complainant.

(5) This defendant further denies that the complainant is entitled to the relief prayed upon any of the grounds [fol. 117] stated in its said complaint, and further says that the complainant is not entitled to relief because of the matters and things hereinafter stated as an affirmative defense to the allegations of said petition.

(6) Defendant avers that by this proceeding and similar proceedings had before the Illinois Commerce Commission the complainant seeks to obtain the connection of the alleged mine lead track with the railway of defendant and thereby in legal effect and for practical purposes compel the defendant to extend its railway to and in connection with the railway of the Illinois Central and enable the Illinois Central to use

said track as a part of its railway in connection with the railway of the Southern Illinois Railway and Power Company and thereby extend the coal-hauling facilities of the Illinois Central Railway road from the mine of complainant to the alleged connection and thence over the rails of the Southern Illinois Railway and Power Company parallel with the railway of defendant southwesterly on the north side of its main track of railway to Harrisburg, thence to Carrier Mills, and so enable the Illinois Central Railroad Company to compete with the defendant for the transportation of coal from all of the mines located on the railway of the defendant in Saline County; that more than fifteen (15) years ago the defendant reconstructed its railway from Danville to Harrisburg by lowering its grade, reballasting the same and laying heavy rails, reconstructing its bridges, constructing passing tracks and double tracks to enable it to haul long and heavy trains of coal cars, and constructed an expensive classification yard at Harrisburg for the handling of coal, built a main track spur from Harrisburg called its Saline Valley Line into the coal field of Saline County, all at an expense of ten millions of dollars, to enable defendant to handle the coal business of the territory tributary to its said railway in said county; that since said improvement twenty-one (21) mines have been located on the railway of defendant from Harrisburg south southwestward to Carrier Mills and on said Saline Valley Railway; that by agreements between the Illinois Central Railroad and complainant and between the Southern Illinois Railway and Power Company and complainant, complainant has provided for the operation of the said Southern Illinois Railway and Power Company's railway in connection with said alleged mine lead track to and in connection with the Illinois Central Railroad and the operation of the Illinois Central Railroad over said alleged mine lead track [fol. 118] to and in connection with the said Southern Illinois Railway and Power Company's track; that heretofore the said Southern Illinois Railway and Power Company has not engaged in the transportation of freights to any large extent and has hauled only local freights from the connection of the Illinois Central with said railway at Eldorado to local points along said railway; that its railway is an electric railway designed primarily to haul pas-

sengers in the mining district from Eldorado to Carrier Mills; it has not become a common carrier generally of freights to any other or greater extent than as aforesaid and has not become a carrier of coal actually or by any agreement or arrangement with any other railway, but the object and purpose of the said railways and the said complaint is that when said mine lead track shall be completed it will be operated for the transportation of both passengers and freight as a main line of railway in extension of the said Southern Illinois Railway and Power Company's railway and as a main track from which spurs are to be extended into the coal field of Saline County naturally tributary to the railway of the defendant; that if said track should be so operated it would enable the Southern Illinois Railway and Power Company to connect with practically all of the mines on the railway of the defendant and by said track connected with the Illinois Central Railroad said mines would in effect become mines upon the railway of the Illinois Central Railway Company; that the contracts referred to contain provisions which would accomplish this purpose, unexecuted copies of which for the purpose of showing the provisions of the contracts actually executed and in existence are hereto attached marked "Exhibits A and B" and made a part of this answer; that after the execution of these contracts without the knowledge of this defendant and without making the defendant a party to said proceeding, the said complainant and the said railway companies made a joint application to the Illinois Commerce Commission and by agreement obtained an order of said Commission, without hearing, granting to the Illinois Central Railroad Company the power and authority to construct and operate said alleged mine lead track and maintain the same in accordance with the provisions of said contracts, a copy of which said order is hereto annexed marked "Exhibit C" and made a part hereof; that thereafter at a hearing before the Illinois Commerce Commission on an application by the complainant for an order requiring a track connection between said alleged mine lead track and the railway of defendant, the defendant made a motion to set [fol. 119] aside said order, consolidate said causes, and for a hearing of the consolidated cause, which was allowed, said causes consolidated and said hearing had; that at said hearing the complainant and his counsel disclaimed any intention

to compel or ask that the defendant operate said mine lead track and disclaimed that said application was made for the purpose of obtaining additional cars from the defendant to supply its said mine, but insisted that said application was made for the sole reason that the Illinois Central did not furnish adequate facilities to reach the markets and stated that it made no complaint of the Illinois Central for failure to furnish an adequate supply of cars; that said complainant well *known* that when said tracks were built according to the plans provided by said contracts and connected with the railway of the defendant, the railways of the Southern Illinois Railway and Power Company and the Illinois Central Railroad Company said track would constitute under the Constitution and Laws of Illinois a part of the railway public highway of the state free for the use of all persons whatsoever, and that when said construction was accomplished no agency of the State of Illinois or of the United States would have power, jurisdiction or authority to prevent the use of said tracks as railways; that the complainant induced the Illinois Commerce Commission to enter an order authorizing the construction of said track and another order requiring the defendant to permit a track connection therewith; that the defendant appealed from said orders to the Circuit Court of Saline County, said cause was heard on November 5, 1923, and an order entered January 11, 1924, affirming said orders; that there has been a further appeal by the defendant from said orders to the Supreme Court of the State of Illinois; that while said cause was pending in the Circuit Court of Saline County suspension orders were entered by said Court suspending the force and effect of said orders pending said appeal, which under the law of Illinois goes to the April Term, 1924, of the Supreme Court of Illinois; that said orders when entered provided upon their face that said track when installed shall be used only as a mine lead track in taking cars from the railway of defendant to said mine for loading and returning said cars to the connection with defendant's railway and not otherwise; that said construction pursuant to said contracts and the orders of said Commission, or pursuant to the orders of said Commission independently of said contract, would in legal effect extend the railway of the Illinois [fol. 129] Central Railroad Company to the connection with the railway of the Southern Illinois Railway and Power

Company and the railway of the defendant and an extension of the railway of the defendant to the connection of said track with the Illinois Central Railroad; and said orders were entered without making application either to the Illinois Commerce Commission or to this Honorable Commission for a certificate of convenience and necessity; that said orders are in excess of the power and jurisdiction of the Illinois Commerce Commission and in conflict with the jurisdiction and power of this Honorable Commission; that the limitation in said orders limiting the use of said tracks when constructed is void and of no effect, because in conflict with the express provisions of the Constitution of Illinois; that it is but a distance of approximately twelve or fifteen miles northwest on through the coal fields of Saline Coun-y to the point at which the Illinois Central is now constructing and proposes to construct its main line railroad from Edgewood, Illinois, to Fulton, Kentucky, for the transportation of coal from said territory; that said new line of railroad will cross and connect with the Eldorado branch, on which complainant's mine is located; that said mine will have the use of not only the adequate facilities now provided it for reaching the markets, but in connection with said main line would as located practically have the advantages incident to a direct connection with the main line equivalent to the average line located on spur from a trunk line; that if the complaint of want of transportation facilities had been in good faith this new construction would obviate and meet all complaint of that character and put said mine on the main double-track railway of the Illinois Central Railroad Company from Chicago to New Orleans, and all of its connections.

Wherefore, the defendant prays that the said complaint be dismissed and that the complainant go without day.

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, by L. J. Hackney, General Counsel, Big Four office building, Cincinnati, Ohio; H. N. Quigley, Big Four office building, Cincinnati, Ohio; D. P. Connell, No. 527 La Salle Street station, Chicago, Ill.; Geo. B. Gillespie, No. 504 Reisch Building, Springfield, Ill., Attorneys for Defendant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

[fol. 121] EXHIBIT A

This Agreement, Made and entered into this twentieth day of December, A. D. 1922, by and between the Illinois Central Railroad Company, party of the first part, hereinafter called the Railroad Company, and the J. K. Dering Coal Co., a corporation, of Chicago, Illinois, party of the second part, hereinafter called the Coal Company, Witnesseth:

Whereas, the Coal Company operates a coal mine in the vicinity of Mile Post 118 from East St. Louis, adjoining the right of way and tracks of the Railroad Company near Eldorado, Illinois, and in order to facilitate the handling of its business, desires to construct a track connecting with the lead from the main track of the Railroad Company to the mine tracks serving the Coal Company's mine to a connection with the track of the Big Four at a point about 2¼ miles due South of the connection with the track of the Railroad Company, the location of said track and connections being approximately as indicated in red on the plat hereto attached and made a part hereof; and,

Whereas, the Coal Company desires that the Railroad Company construct and maintain said track at the expense of the Coal Company; and,

Whereas, said proposed track will cross at grade the main track of the Railroad Company, and the Railroad Company is willing to permit such crossing, including connection of said proposed track to the track of the Railroad Company, and to construct and maintain said proposed track for the Coal Company.

Now, Therefore, the Railroad Company, in consideration of the covenants and agreements of the Coal Company hereinafter expressed, hereby grants to the Coal Company the right to lay down, maintain and operate a single track railway of standard gauge over and across its waylands and tracks at a point — feet West of Mile Post 118, and to connect said track with the lead leading out of the Railroad Company's main track to the mine tracks of the Coal Company, which grant is made subject to the following conditions:

1. Said track shall be constructed upon and across said waylands and tracks of the Railroad Company, including its connection with the track of the Railroad Company at such location and in accordance with such plans and specifications as shall have been approved or prepared by the Chief engineer of the Railroad Company, and shall at all times be maintained in first-class condition to the satisfaction of said Chief Engineer, or his duly authorized representative.

[fol. 122] 2. Notwithstanding the grant herein made, the Railroad Company shall have the right at any time to change the grade of its roadbed and tracks, or to install additional tracks over the track of the Coal Company herein authorized to be laid, and the Coal company agrees at its own expense, to change the grade of its roadbed and track to conform to the grade of the roadbed and tracks of the Railroad Company, and to assume all expense incident thereto, or to install and thereafter maintain, of its own expense, such additional crossing or crossings to accommodate the additional track or tracks constructed by the Railroad Company. The crossing or crossings to be installed by the Coal Company in such event shall be of the same weight of material as used in the rails of the tracks of the Railroad Company, and of such design, character and quality as shall be satisfactory to said Chief Engineer.

3. In the passage of trains over said crossing the trains of the Railroad Company shall have prior right of way over said crossing in preference to trains using or operating over the track of the Coal Company.

4. Whenever the Railroad Company, or the laws of the State of Illinois, or any other lawful authorities shall require a flagman or flagmen to be stationed at said crossing, or shall require said crossing to be protected by signals or gates or by interlocking and derailing system, or any other safety appliances, in any such case the Railroad Company shall employ, as hereinafter provided, and pay the wages of such flagmen, and shall employ, as hereinafter provided, and pay the wages of all persons required for the operation of any such signals, gates, interlocking and derailing plant, or other safety appliances, and shall furnish all supplies and pay all other expenses of operating the same, and

after the construction of any such signals, gates, interlocking and derailing plants or other safety appliances, shall repair, maintain and renew the same from time to time as may be necessary and the Coal Company hereby agrees within fifteen (15) days after the presentation of bills therefor to repay to the Railroad Company all expense incurred by the Railroad Company for the purposes mentioned in this paragraph.

And the Coal Company shall also, at its own cost and expense provide and put in place, or cause to be provided and put in place in accordance with plans and specifications prescribed by the chief engineer of the Railroad Company, and approved by the Illinois Commerce Commission, or other legal authority having jurisdiction over railroad [fol. 123] crossings in said state, all such signals, gates, interlocking and derailing plant or other safety appliances which may be so required at said crossing. Such plans and specifications shall include the preparation and change in the tracks of both parties incident to the application and use of any such signals, gates, interlocking and derailing plants or other safety appliances, the connection of the tracks of both parties therewith and all other things necessary to the proper working of such appliances, and to provide for the protection and operation of the railroads of both parties in connection therewith.

In case the Railroad Company shall construct any additional tracks, switches, crossovers or connections within the limits of said interlocking plant, the Railroad Company shall furnish all labor and material required for additions to or alterations in said plant to include the operation of said additional tracks, switches, crossovers, crossings or connections, and the Coal Company agrees to reimburse the Railroad Company for all expenses so incurred within fifteen (15) days after bill shall have been rendered therefor, plus the percentages on labor and material as provided in Article 6 hereof.

5. The Coal Company shall, at its own expense, procure all right of way required for said track and secure the necessary permission from governmental authorities to construct, maintain, operate and use said track and make proper arrangements with the Southern Illinois Railway & Power Company and the Cleveland, Cincinnati, Chicago & St.

Louis Railway Company over which and with which companies' tracks said track to be constructed hereunder is to cross and connect.

6. The Railroad Company agrees after the provisions of Article 5 hereunder shall have been complied with by the Coal Company and the payment to it by the Coal Company of the sum of Sixty Thousand Dollars ($60,000.00), to lay and construct said track and furnish all material needed therefor. It is understood and acknowledged that the amount to be paid by the Coal Company represents the entire estimated cost of the work to be done and material to be furnished by the Railroad Company in the construction of said track, and it is agreed that if the actual cost of said work and material, plus 10 per cent on labor to cover supervision and accounting and 15 per cent on material to cover freight charges and cost of handling, shall be more or less than said sum, an adjustment shall be made between the parties hereto, to the end that the Coal Company shall only be required to pay to the Railroad Company the actual cost incurred by the Railroad Company in laying and construct-[fol. 124] ing said track plus said percentages.

It is mutually understood and agreed that in the event the Coal Company is unable to arrange for a physical connection between said track and the tracks of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, or be assured of the transportation service of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company for coal produced at said mine, and comply with the provision of Article 5, then there shall be no obligation on the part of said Coal Company to construct or pay for the construction of said track, and all of the obligations imposed by this contract on the respective parties hereto shall be made null and void.

7. The Railroad Company further agrees to maintain said track in suitable condition, furnishing all labor and material required therefor, and the Coal Company agrees, within ten (10) days after receipt of statement, to reimburse the Railroad Company for all expense actually incurred by the Railroad Company in the maintenance of said track, plus the percentage hereinabove mentioned on labor and material.

8. It is expressly understood and agreed that the employes of the Railroad Company while engaged in the construction and maintenance of said track and supervision of such work shall, while so engaged, be considered the sole employes of the Coal Company, and the Coal Company hereby agrees to assume all liability for death of or injury to such employes, the property of said employes, death of or injury to persons, damage or injury to property whatsoever, which may in any way be attributable to the negligence, acts or ommissions of said employes, or the construction and maintenance of said track.

9. All persons employed for the protection, construction and maintenance of said crossing or crossings herein contemplated, or the operation of any such signals, gates, interlocking or safety appliances, shall be deemed the employes of the Coal Company, and the Coal Company agrees to assume all responsibility for the negligence of such employes, and to indemnify and save harmless the Railroad Company from any loss, costs, damage and expense, including attorneys' fees, which it may incur or suffer, caused by, growing out of, or in any way attributable to the negligence of such employes.

The Coal Company further agrees to assume all responsibility for, and to indemnify the Railroad Company against, any liability for death of or injury to persons, damage or injury to property, which may be attributable to the [fol. 125] construction, maintenance, existence or use of said crossing or crossings, it being understood that said track and crossings to be constructed hereunder are to be used by other Railroad Companies in order to serve the Coal Company's said mine, and that the Coal Company assumes all responsibility and liability on account of the use of said track and crossings by such Railroad Companies as in this agreement provided, the same as if the Coal Company were operating its own engines and cars over said track and crossings.

10. Payment of any bills rendered by the Railroad Company hereunder shall not be delayed on account of any dispute or disagreement, but the disputed items shall be promptly considered and adjusted and in case the claim of the Coal Company shall be found correct, any amounts due

the Coal Company on account of such adjustment shall be repaid and refunded by the Railroad Company within ten (10) days after such adjustment shall have been made.

All bills rendered by the Railroad Company against the Coal Company for labor and material furnished by the Railroad Company hereunder shall include 10 per cent on the cost of labor to cover supervision and accounting and 15 per cent on material to cover freight charges and cost of handling; provided, however, that said percentages shall not apply on the wages of regularly assigned employes stationed at said crossing as flagmen or to operate interlocking plant or other safety device.

11. As a further consideration for the covenants and agreements to be kept and performed by the Railroad Company herein provided the Coal Company does and hereby grants to the Railroad Company the right to use said track and operate its engines and cars thereover, jointly with such other company or companies as may be permitted by the Coal Company to use said track, and also the right to construct spur tracks leading out of said track, but the expense in connection with such spur tracks shall be assumed by the Railroad Company. The Railroad Company agrees to use said track in such manner as to not unreasonably interfere with the use to be made of same by any other company or companies. The Coal Company further grants to the Railroad Company the right to construct a track connecting with the main track of the Railroad Company, and said track to be constructed by the Coal Company hereunder, but all expense in connection therewith shall be assumed by the Railroad Company.

[fol. 126] 12. This agreement shall continue in force so long as said track to be constructed hereunder shall be used for the purpose of handling coal from said mine or mines of the Coal Company, and when said track shall be no longer required for such purpose this contract shall terminate and be of no further force or effect save as to those obligations accruing prior thereto, and the Coal Company shall take up and remove that portion of said track, including the crossing frogs in the tracks of the Railroad Company, as well as any other property of the Coal Company located upon said waylands, and restore said track and waylands of the Rail-

road Company substantially to their previous condition. If the Coal Company shall fail to make such removal and restoration within ten (10) days after this contract shall have terminated, the Railroad Company shall have the right, at its option, to remove that portion of said track located upon its waylands, including crossing frogs or any other property of the Coal Company located thereon, and restore its waylands and track substantially to their previous condition, at the risk and expense of the Coal Company.

13. Upon termination of this agreement, or when said track shall be no longer required by the Coal Company, the Railroad Company shall have the option of purchasing all of said track indicated in red on the plat hereto attached, and the Coal Company agrees to sell same to the Railroad Company, if it desires to purchase, at a price to be mutually agreed upon, but in no event shall said price be greater than the actual cost to the Coal Company; and if the Railroad Company does not desire to purchase said track, that portion thereof, including said crossings, located on the waylands of the Railroad Company, shall be removed therefrom as in the next preceding article hereof provided.

14. This agreement shall be binding upon the successors and assigns of the parties hereto, but the Coal Company shall not assign, transfer or underlet to any other company or person any of the privileges herein granted by the Railroad Company, or any interest in this contract, without the consent of the Railroad Company first having been obtained.

15. This contract is made subject to the approval of the Illinois Commerce Commission.

[fol. 127] In Witness Whereof, the parties hereto have caused these presents to be executed in duplicate, by their duly authorized officers, the day and year first above written.

Illinois Central Railroad Company, by ——— ———, Vice-President. J. K. Dering Coal Co., by ——— ———, President.

EXHIBIT B

This Agreement, entered into this — day of ——, 192-, between J. K. Dering Coal Co., a corporation of the State of Illinois, party of the first part, and the Southern Illinois Railway and Power Company, a corporation of the State of Illinois, party of the second part,

Witnesseth, That,

Whereas, the party of the second part is a common carrier engaged in the transportation of passengers and freight for hire, operating an electric line of railroad in Saline County, Illinois, and

Whereas, the party of the first part owns and operates a coal mine in Saline County, Illinois, and is desirous of having constructed a track from its said line to a connection with the Cleveland, Cincinnati, Chicago and St. Louis Railway Company in said Saline County, for the purpose of shipping coal produced at its said mine over the line of said Cleveland, Cincinnati, Chicago and St. Louis Railway Company, which track will cross at grade the line of railroad of the party of the second part, substantially as shown on blue print hereto attached, marked "Exhibit A," and made a part hereof.

Now, Therefore, for and in consideration of the sum of one dollar, each to the other in hand paid, and the mutual covenants and agreements hereinafter set forth, the parties hereto hereby agree as follows:

1. Party of the second part agrees to permit party of the first part, its agents, successors or assigns, to construct upon and across its line of railroad a railroad track, hereinafter referred to as "mine lead track" at a point about — miles from the City of Eldorado, Illinois as shown on the [fol. 128] blue print attached hereto and made a part hereof; said mine lead track to be used, in addition to the uses thereof by party of the second part hereinafter set forth, for the purpose of transporting railroad cars, loaded and empty, between the mine of the party of the first part of any other industry or point of connection located upon or along said mine lead track, and the track connection from said mine lead track to the tracks of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, near the City of Eldorado, Saline County, Illinois.

2. Said party of the second part hereby grants and conveys to the party of the first part, its successors and assigns, for a period of ninety-nine years from the date hereof, a right of way for said mine lead track over and across the track and right of way of party of the second part for the uses and purposes in this agreement provided, including the right to construct, maintain and repair said mine lead track, and the right to operate locomotives, trains and cars upon said mine lead track, over and across said track and right of way of party of the second part, and the right also to permit the Illinois Central Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, or any other railroad, to so operate over said mine lead track and said right of way, subject to the rights of party of the second part in this agreement provided.

3. Party of the first part hereby grants and conveys to party of the second part the right to operate locomotives or electric engines, trains and cars over said mine-lead track for the purpose of transporting passengers and freight from and to all points of origin and destination on said mine-lead track, or transporting freight and passengers originating and distant from and to points on the connecting line, and the right to construct, on and from said mine-lead track, and over and upon the right of way of said mine-lead track, a wye or other suitable track connection between said mine-lead track and the track of the party of the second part, and agrees to pay to party of the second part one-half of the costs and expense of the installation and construction of such wye or connection promptly upon the completion thereof.

4. Party of the first part also grants and conveys to party of the second part the right to construct along, upon and over the right of way of said mine-lead track, or adjacent thereto, as party of the second part may desire, poles and wires for the transmission of electric power to be used [fol. 129] in the operation of its said engines, trains and cars; provided, that said poles and wires shall be so constructed as to permit steel locomotives railroad operation upon and over said mine-lead track and as not to unreasonably interfere with the use of said mine-lead track by the party of the first part, its agents, lessees, successors or as-

signs. And party of the first part also grants and conveys to the party of the second part the right to construct along and upon the right of way of said mine-lead track, poles and wires for the transmission of electric energy for power and sale purposes, provided that the poles and wires so constructed for said last-mentioned use shall be so located as not to interfere with the use of said mine-lead track.

5. Said party of the second part shall conduct said transportation and railroad operations over said mine lead track in such manner as will not unreasonably interfere with the transportation of loaded and empty coal cars to and from the said mine of party of the first part, or to and from any other mine or industry now or hereafter located on, or adjacent to, said mine lead track.

6. As a further consideration for the covenants and agreements to be kept and performed by the party of the first part, the party of the second part agrees that it will, at the request of said party of the first part, transport empty and loaded coal cars between the mine of party of the first part and the tracks of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and charge for such service the usual and customary connecting line switching rates generally maintained and published by the coal-carrying railroads in the State of Illinois for performing similar service. In performing any service desired by said first party under this section, it is understood that said second party shall act as the agent of the first party in performing said service.

7. In the event other industries or mines are served over and by said mine lead track, the cost to party of the first part of constructing and maintaining said mine lead track shall be apportioned between party of the first part and such other industries in proportion to the amount of use of said mine lead track for party of the first part and the use of said mine lead track for such other industry.

8. Party of the first part shall pay the entire cost and expense of constructing said mine lead track and the cost thereof over the existing track and the right of way of party of the second part herein granted, and also the additional [fol. 130] cost and expense made necessary by said cross-

ing in the installation or construction by party of the second part of additional tracks along and over said crossing.

9. It is mutually agreed between the parties hereto that the costs of construction and maintenance of protection gates or other protection devices required by the Illinois Commerce Commission or other Governmental authority for the protection of the crossing of said coal company's tracks over the tracks of the party of the second part, shall be paid for and borne equally between the parties hereto.

10. Party of the second part will indemnify and save harmless party of the first part against any and all suits, claims, judgments, awards, expenses or loss growing out of damage to property, or injury to or death of any person or persons resulting from the operation by party of the second part of its said engines, trains or cars upon said mine-lead track, or from the construction and location of its said poles and wires on the right of way of said mine-lead track.

11. In the event party of the second part shall use said mine-lead track for transporting engines, trains or cars carrying either passengers or freight, or both, party of the second part will pay to party of the first part its proportion of the expense of maintaining said track, including the expense incurred by said first party in maintaining, protecting and operating said tracks over the tracks of the Illinois Central Railroad Company, said maintenance expense to be apportioned on the basis of the number of cars of party of the second part passing over said mine-lead track to the total number of cars passing over the same.

12. It is understood between the parties hereto that the party of the first part has heretofore entered into a contract with the Illinois Central Railroad Company, dated ——, ——, concerning the construction, maintenance, operation and use of said track and crossing over the Illinois Central Railroad Company's tracks whereby the Illinois Central Railroad Company is granted certain rights, and the party of the first part has assumed certain liabilities and obligations, copy of which contract is attached hereto and made a part hereof and marked "Exhibit B"; and it is agreed between the parties hereto that the rights granted and conveyed by said first party are subject to the limita-

tions and conditions imposed upon it under the terms and conditions of its said contract with the Illinois Central Railroad Company.

It is further covenanted and agreed that said second {fol. 131} party assume all responsibility for and agrees to indemnify the party of the first part for all loss, damage or liability that said first party may suffer or be required to pay, assumed by and imposed upon said first party under the terms and conditions of its said contract with the Illinois Central Railroad Company, or otherwise caused by the use and operation of said tracks and crossing by the party of the second part under the grant herein made.

13. Party of the first part specifically reserves the right to abandon and cease operating said mine lead track at any time, and will, upon so doing, surrender the right of way herein granted, and upon such surrender the rights and obligations of the parties hereunder shall cease and determine; provided, that in event of the termination of this agreement by abandonment and surrender as aforesaid, each party shall have the right, notwithstanding such termination, to recover from the other any obligation or liability which shall have accrued under this agreement while the same was effective and in operation; provided, further, that upon such abandonment, and a failure by party of the second part to purchase as hereinafter provided, party of the first part shall at its expense and at the request of party of the second part, remove said crossing over the track or tracks of party of the second part and restore the track or tracks of the party of the second part to proper operating condition. And provided, further, that in event the Illinois Central Railroad Company does not desire to purchase said track, as provided in said contract hereto attached, that sixty days prior to such abandonment party of the first part will give notice thereof in writing to party of the second part and will at the request of party of the second part transfer and convey to party of the second part, by proper instruments of conveyance, said mine lead track and all rights and appurtenances thereunto appertaining and belonging at and for an amount equal to the cost thereof to party of the first part, less such sum as will equal then existing physical depreciation.

14. It is mutually understood and agreed between the parties hereto that the primary purpose for which said

track is being constructed by the Coal Company is to use the same in the shipping of coal produced at said mine over the railroad of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and in event that said Coal Company is unable to arrange for a physical connection between said track and the tracks of the Cleveland, Cincinnati, [fol. 132] Chicago and St. Louis Railway Company, or to be assured of the transportation service of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, as aforesaid, then there shall be no obligation on the part of said Coal Company to construct or operate said track, and all of the obligations imposed by this contract on the respective parties hereto shall be null and void.

In Witness Whereof, the parties hereto have caused this agreement to be executed the day and year first above written.

J. K. Dering Coal Company, by ——— ———, Vice-President. Attest: ——— ———, Secretary. (Seal.) Southern Illinois Railway and Power Company, by ——— ———, President. Attest: ——— ———, Secretary. (Seal.)

EXHIBIT C

STATE OF ILLINOIS:

ILLINOIS COMMERCE COMMISSION

No. 12819

ILLINOIS CENTRAL RAILROAD COMPANY, SOUTHERN ILLINOIS RAILWAY AND POWER COMPANY, and THE J. K. DERING COAL COMPANY.

Joint Petition for Permission to Extend a Mine Lead Track for the said Coal Company at Grade Across the Main Tracks of the said Railroad Companies, and at Grade across Three Public Highways, All in Raleigh Township, Saline County, Illinois

[fol. 133] By the COMMISSION:

On November 25, 1922, the Illinois Central Railroad Company, the Southern Illinois Railway and Power Company and the J. K. Dering Coal Company filed a joint petition

for permission to extend a mine lead track from Dering Mine No. 2 of the said coal company at grade across the main tracks of the said railroad companies, and across three public highways, all in Raleigh Township, Saline County, Illinois, to a connection with a certain sidetrack of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, as shown diagrammatically by solid red lines on a certain blue print dated November 22, 1922, attached to the said petition and made a part thereof.

The petition sets forth that said Mine No. 2 is located about two and one-half miles west of the City of Eldorado, immediately north of the main track of the Illinois Central Railroad Company, that the said mine lead track extending southerly therefrom will be about two miles long, and is being constructed for the purpose of furnishing an outlet for coal shipments to points south, and that the parties hereto have agreed among themselves as to the manner in which the said railroad crossings shall be constructed, as well as the expense thereof, the entire cost of the construction of the said track and such crossing protection as may be necessary to be borne by the J. K. Dering Coal Company. The crossing of the said lead track with the main track of the Illinois Central Railroad Company is located about the center of section 24, while the crossing of the said lead track with the main track of the Southern Illinois Railway and Power Company is located about the center of section 36.

On November 28th the proposed railroad crossings and the proposed highway crossings were viewed by a member of the engineering section of the Commission in company with representatives of each of the interested parties, and the report submitted indicates that it is practical to construct and operate the said mine lead track in the manner set forth in the petition; that the train operation on the said lead track will consist of switching movements back and forth between the said mine and the connections with the various railroads involved herein; that probably there will not be more than two or three such movements per day; that train movements on the Illinois Central Railroad consists of the operation of freight trains and local passenger trains, while movements on the main line of the Southern

[fol. 134] Illinois Railway and Power Company consists of the operation of interurban passenger cars, about one car each way every hour; that the said railway and power company desires some form of interlocking protection at the crossing of its main track with the said mine lead track in order to avoid the necessity of stopping its cars at the crossing, while the Illinois Central Railroad Company proposes, for the time being at least, to stop all of its trains at the proposed crossing of the said mine lead track with its main track, in order to obviate the necessity of installing interlocking protection which would otherwise be necessary; that the physical surroundings at the proposed crossings between sections 24 and 25, and between sections 25 and 36 are such as to require special crossing protection, the view at these crossings being badly obstructed; and, that the parties hereto have agreed among themselves as to the manner of crossing in each case, the protection necessary and the expense involved.

The petition in this matter is accompanied by a statement dated December 1, 1922, and signed by G. E. Whitlock, Highway Commissioner of Raleigh Township, granting authority to the J. K. Dering Coal Company to extend its mine lead track at grade across three public highways at grade in the said township, as follows:

(a) an east and west public highway known as the Eldorado Harrisburg Road on the line between Sections 24 and 25;

(b) an east and west public highway on the line between Sections 25 and 36; and,

(c) an east and west public highway known as the Wasson Harrisburg Road on the center line of the north half of Section 36;

all of these crossings being approximately midway east and west of the said sections.

Accompanying the petition also is a statement dated December 8, 1922, and signed by the J. K. Dering Coal Company and the Southern Illinois Railway & Power Company, setting forth that the latter company consents to the installation of the proposed crossing to be formed by the intersection of their tracks near the southerly end of the pro-

posed mine switch in Section 36, and that the said parties have reached an agreement relative to the installation and expense of such protection as the Commission may deem necessary at the said crossings, a preference being expressed for swinging crossing gate protection, however.

The Commission having given due consideration to the petition in this case, and having caused the said proposed [fol. 135] railroad crossings at grade to be viewed as required by law and after full investigation and with due regard to the safety of life and property, is of the opinion and finds that the construction of the said mine lead track is necessary in order to facilitate the movement and distribution of coal cars to and from Dering Mine No. 2 and to increase the output thereof; that the installation of the said crossings will not unnecessarily impede or endanger traffic or transportation upon the railroads to be crossed; that the parties hereto have agreed among themselves as to the construction of the said crossings, the right to cross, the matter of crossing protection, and the expense in connection therewith; that interlocking connection is unnecessary at the crossing of the said mine lead track with the main track of the Illinois Central Railroad Company; that the installation of a swinging crossing gate of an approved type should be installed at the crossing of the mine lead track with the main track of the Southern Illinois Railway & Power Company in order to avoid unnecessary delays to passenger cars on the latter's line of railway; that the Highway Commissioner of Raleigh Township has given his consent in writing to the extension of the said mine lead track at grade across the three public highways enumerated above, and that the prayer of the petitioners should be granted.

It is, therefore, ordered that permission be, and the same is hereby, granted to the Illinois Central Railroad Company to construct and maintain, or cause to be constructed and maintained, across its single main track, at grade, a mine-lead track for the purpose of serving the J. K. Dering Coal Company in the operation of its coal mines, at a point about two and one-half miles west of the City of Eldorado, near the center of section 24 in Raleigh Township, Saline County, Illinois, as shown diagrammatically on a certain

blue print dated November 22, 1922, attached to the petition in this case and made a part thereof, and thereafter to operate its engines and cars thereover.

Nothing herein is intended to waive any requirements of section 12 of an act entitled, "An Act in Relation to Fencing and Operating Railroads," approved March 31, 1874, in force July 1, 1874 (Hurd's Revised Statutes 1913, Ch. 114, Secs. 62-76).

It is further ordered that permission be, and the same is hereby, granted to the Illinois Central Railroad Company to construct and maintain, or cause to be constructed and maintained, at grade, across the single main track of the [fol. 136] Southern Illinois Railway and Power Company, a mine-lead track for the purpose of serving the J. K. Dering Coal Company in the operation of its coal mines, at a point about three and one-half miles southwest of Eldorado, near the center of section 36, Raleigh Township, Saline County, Illinois, as shown diagrammatically on a certain blue print dated November 22, 1922, attached to the petition in this case and made a part thereof, and to operate its trains and cars thereover, the right to cross first having been secured as required by law.

It is further ordered that the Illinois Central Railroad Company and the Southern Illinois Railway and Power Company be and the same are hereby, permitted and authorized to install a swinging crossing gate of a type and pattern which shall meet the approval of the Commission, with red banners for day indication and red lights for night indication, at the crossing at grade of the said mine-lead track with the main track of the Southern Illinois Railway and Power Company herein authorized to be installed near the center of section 36, Raleigh Township, Saline County, Illinois, about three and one-half miles southeast of Eldorado, and thereafter to operate and maintain the said service until such time as the Commission may otherwise direct, for the purpose of protecting train movements over the said crossing, the said swinging crossing gate to be set normal for movements on the railroad of the Southern Illinois Railway and Power Company.

It is further ordered that the Southern Illinois Railway

and Power Company, within thirty (30) days from the date of service of this order, shall submit to the Commission for approval plans in triplicate, showing in a general way the design and manner of installing the said swinging crossing gate herein authorized to be installed at the said crossing.

It is further ordered that the Southern Illinois Railway and Power Company shall notify the secretary of this Commission, in writing, as soon as the said swinging crossing gate has been installed and ready for operation, so that an inspection may be made by the Commission before same is placed in service. If upon inspection the Commission finds that said device is substantially constructed and will form adequate protection for the said crossing, the said Railway and Power Company is hereby permitted and authorized to operate its cars and trains over said crossing without stopping, provided said swinging crossing gate is properly set for movements on its main track and against trains on the said mine-lead track.

It is further ordered that permission be, and the same is hereby, granted to the Illinois Central Railroad Company [fol. 137] to construct and maintain, or to cause to be constructed and maintained, at grade, a mine-lead track for the purpose of serving the J. K. Dering Coal Company across the three public highways in Raleigh Township, Saline County, Illinois, as follows:

(a) an east-and-west public highway known as the Eldorado-Harrisburg road on the line between sections 24 and 25;

(b) an east-and-west public highway on the line between sections 25 and 36;

(c) an east-and-west public highway known as the Wasson-Harrisburg road on the center line of the north half of section 36;

all of these crossings being approximately midway east and west of the said sections in which they are located, as shown diagrammatically on the said blue print attached to the petition in this case, and thereafter to operate its engines and cars thereon.

It is further ordered that the crossings thus formed shall

be so constructed that the top of the track rails shall be flush and level with the top surface of the highways at the points of intersection; that each of the said crossings shall be full planked between rails and as far as the ends of the ties outside thereof for distances of not less than eighteen (18) feet in width measured at right angles to the center lines of the said highways; that the top of the planking in the said crossings shall be flush with the top of rails and present a reasonably smooth surface for highway traffic, and shall be maintained thereafter in that condition; that the highway approaches to the said highways within twenty-five (25) feet from the center line of track shall be maintained with top surfaces at least eighteen (18) feet in width; that such openings shall be constructed and maintained underneath the roadbed at each of the said crossings as may be necessary in order to furnish proper drainage, and that such crossing protection or safety devices shall be installed at the said crossings as is required by law or by order of this Commission.

It is further ordered that the Illinois Central Railroad Company shall make report to the secretary of the Commission, in writing, the date upon which the said mine-lead track is fully constructed across its main track and that of the Southern Illinois Railway and Power Company, and across the three highways in Raleigh Township, Saline County, referred to above, and shall mail such report, or [fol. 138] reports, to the said secretary not later than five (5) days after the completion of the work.

The parties hereto having agreed among themselves as to the expense in connection with the installation of the crossings herein involved, no order is entered at this time with respect thereto, but the Commission retains jurisdiction over the subject matter and the parties hereto for the purpose of entering such further orders as in its opinion public interest or convenience may require.

By order of the Commission at Springfield, Illinois, this 14th day of December, 1922.

(Signed) Julius Johnson, Secretary. (Seal.)

[fol. 139] EXHIBIT 6 TO BILL OF COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 15552

J. K. DERING COAL COMPANY

v.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY

Submitted December 20, 1924. Decided February 7, 1925

Upon the facts of record, Held, That the switch connection asked for by complainant, between the track constructed by it from its coal mine near Eldorado, Ill., and the line of defendant, is reasonably practicable and can be put in with safety, and will furnish sufficient business to justify the construction and maintenance of same. Connection ordered under provision of Section 1 of the Interstate Commerce Act.

C. B. Cardy for complainant.

L. J. Hackney, H. N. Quigley, D. P. Connell, and George B. Gillespie for defendant.

Report of the Commission

Division 5, Commissioners Potter, Esch, Cox and McManamy

By DIVISION 5:

Exceptions were filed by defendant to the report proposed by the examiner, complainant replied thereto, and the issues were orally argued.

Complainant, an Illinois corporation, engaged in the mining of coal in Saline County, in southern Illinois, by complaint filed January 23, 1924, alleges that the failure and refusal of defendant to construct, maintain, operate or install a switch connection between its line of railroad and a track constructed by complainant and extending from its coal mine to defendant's right of way; and that the failure

and refusal of defendant to receive or accept carload shipments of coal for interstate transportation, and to furnish cars for such traffic, is in violation of Section 1 of the [fol. 140] Interstate Commerce Act. We are asked to require the defendant to construct and maintain a switch connection, to accept interstate shipments of coal tendered it, and to award complainant by way of reparation all damages sustained by it from December 1, 1923, to the effective date of our order. All points mentioned are in Illinois.

In 1917 complainant acquired approximately 3,700 acres of coal land near Eldorado, in Saline County, of which approximately 3,400 acres, estimated to contain between 28 and 30 million tons of coal, remain unmined. The hoisting shaft and mine tipple of complainant are located in about the center of this acreage, and 2.5 miles northwest of the defendant's right of way, and immediately north of the right of way of the St. Louis-Eldorado division of the Illinois Central, hereinafter called the Central. This division extends from East St. Louis through Duquoin and Benton to Eldorado, and connects at Eldorado with defendant's Cairo division, running in a northeasterly and southwesterly direction between Danville and Cairo. Complainant now states that the shaft would have been located on the south side of the right of way of the Central had it not expected to secure service from both the defendant and the Central.

Complainant's mine was constructed to produce, and has a potential capacity of 4,000 tons per day and complainant claims it should easily and regularly produce 3,500 tons per day. It is said to be one of the most modern equipped mines in Saline County, but has not reached its full development. The maximum amount produced is between 2,700 and 2,800 tons per day or between 50 and 60 cars. Complainant maintains that the potential capacity could be produced without enlarging the mine capacity or facilities by increasing the labor supply.

The principal reasons advanced for the failure of the mine to develop properly is that the Central is unable to furnish sufficient car service, and that by having but one outlet it is denied additional markets. The mine is located on a branch line about 50 miles from the assembling yard,

and the Central by reason of curves, grades, and other conditions is unable to handle in excess of 25 loads per train from the mine to the assembly yard. Complainant asserts that the mine would soon reach its capacity if it were granted the additional service of the defendant. At the hearing counsel for complainant admitted that this was their sole object in building a switch track and asking for a connection thereto.

[fol. 141] Prior to the acquisition of the coal lands by complainant, negotiations were entered into with the defendant and the Central relative to securing service from both carriers. Complainant already had in operation its No. 3 mine, located on the defendant's line about 1.5 miles east of Eldorado. The arrangement proposed was that when the production of the two mines was approximately equal defendant would enter into a reciprocal switching arrangement with the Central, whereby the latter would serve complainant's mine on the line of defendant, and defendant would in turn serve complainant's mine on the Central. The production agreed upon was reached in 1919. Application was then made to have the proposed arrangement consummated. Defendant instead of proceeding with the proposed reciprocal switching arrangement, suggested the building of a private track from the mine to a point on their line west of Eldorado. A survey was made by an engineering corps of the defendant, and working in connection with complainant's mine engineers, they laid out a tentative switch track, the location of which does not materially differ from the one which has been constructed. Defendant refused to proceed further in accordance with the suggestion or to arrange for the consummation of the reciprocal switching arrangement because it was during the period of Federal control, and the corporation was not making any expenditures during that period. Following this the complaint in Dering Mines Co. v. Director General, 62 I. C. C. 265, was filed wherein a joint status for complainant's mines was sought. That complaint was decided adversely to the Dering Company on June 17, 1921. Following this decision further negotiations were conducted. On November 1, 1921, defendant, through its traffic manager, advised complainant by letter as follows:

If your company cares to construct and maintain at your own expense a track from your mine up to our line, we will

be glad to effect connection with such track, the point of connection of course to be designated by our operating department.

Witness for defendant, who was the writer of this letter, now explains the letter as being a nice way of saying "No." On October 22, 1921, the Vice President of defendant, wrote a letter to the Vice President of complainant, referring to an interview had by the traffic manager with counsel for complainant, in part as follows:

[fol. 142] The substance of this interview was, that the only way in which you could be served would be to have you build your own track at your own expense entirely, from your mine to our main track within the switching limits of Eldorado.

In a letter dated October 28, 1921, between the same parties it was stated "switching limits north of Eldorado are 0.3 mile from the freight station and south 1.3 miles."

After the receipt of these communications complainant took steps to obtain a satisfactory right of way by options upon the land over which the proposed track was to be laid. These options were closed and the fee in the lands purchased at a cost of $33,000.

Thereafter, during 1922, complainant had a survey made and had it platted and submitted to the Vice-President of defendant for his approval. An engineer of defendant met with an engineer of complainant at Eldorado, and went over the ground of the proposed track, but no action seems to have been taken.

In order to reach the line of defendant over this acquired property, it was necessary to cross several highways, and the rights of way of the Central and the Southern Illinois Railway & Power Company. The latter is an electric line operating between Eldorado and Carrier Mills, paralleling the line of the defendant on the north. It will hereinafter be referred to as the Power Company. Contracts were accordingly entered into between the complainant and the Power Company, and also between the complainant and the Central, providing, among other things, for the crossing of the tracks of the Central and the Power Company. The contract with the Central also provided for the construction of the track in question by the Central for the coal company for the sum of $60,000, but it was understood and

agreed that if the actual cost of the work and material, plus a certain percentage to cover supervision and cost, and the freight charges on material would be more or less than that amount, an adjustment would be made. Defendant's officials at the time of these conferences had no information that an attempt would be made to have the Central operate over this track and have the right to extend spurs from it.

Defendant owns approximately 39,000 acres of coal land adjacent to its right of way in Saline County. Some of this land has been leased to the O'Gara Coal Company on a royalty basis. It opposes the installation of the connection, apparently for fear that the Central might some day op- [fol. 143] erate over complainant's line and in connection with the Power Company reach these valuable coal properties.

Construction of the track of complainant was started in the latter part of 1923 and finished the first part of 1924. It connects with the lead track of the Dering Coal Company about 200 feet north of the crossing of the Central and extends in a southerly direction about 2.5 miles toward the line of the defendant. It is constructed of what is known as re-lay 85-pound rails on creosoted or treated ties. The track is on from 12 to 18 inches of cinders, gravel, chats, or screening ballast, and is in good line and surface. The crossings with the Central and the Power Company are of 90-pound rail. There is one timber trestle which is of standard construction. The track ends at approximately the line of the defendant's right of way. Between the right of way of the Power Company and that of defendant where the connection is sought, complainant has constructed two tracks, one of which they claim can be used as a passing or run-around track, and which will permit of the placing of empties on one track, while loads are standing upon the other.

After the acquisition of the right of way for the track, but before construction thereof, the complainant made two written requests upon defendant for a connection. After the construction of the track had been completed another request dated January 18, 1924, was made for such connection. On February 9, 1924, which was after this complaint had been filed, but prior to the hearing, complainant offered to the defendant for billing and transportation one car of coal which was then standing at the extreme south

end of the switch or mine lead track at the right of way of defendant and at which point a connection is sought. It being impossible to accept this traffic at that point, defendant's agent at Eldorado so advised complainant, but stated that it would be accepted at Eldorado. It was not offered there and complainant's witness admitted that it had no record of ever having traffic refused which was offered for transportation by that route.

The cost of the connection is estimated at approximately $2,000 and complainant contends that inasmuch as it has expended a great sum for the construction of the track and will maintain it, the defendant ought to construct and maintain at its own expense the switch and all appurtenances thereto on its right of way. It is contended by the complainant that the business which will be handled or received over such connection will be sufficient to justify the installation and maintenance.

[fol. 144] A great percentage of the coal produced by complainant at the present time and in the past has moved primarily to Chicago or points beyond, while four competing coal companies, located on defendant's line in Saline County, shipped 21.7 per cent of their tonnage to the same territory. This covered a period of full car supply. Complainant contends that had it an outlet by the defendant, it would have been able to ship more coal because of the additional markets that would have been open to it. There is also a contention and some testimony to the effect that complainant was precluded from markets in Michigan and Indiana because coal dealers prefer a one-line haul. In order to reach these markets at the present time a haul over two or more lines is necessary.

Complainant introduced in evidence a statement which shows that four competing companies in Saline County, served by defendant, shipped during the year ended March 31, 1922, 52.9 per cent of their total output to destinations other than in Illinois and the Chicago switching district, whereas complainant shipped 27.7 per cent to such other destinations. The contention is that this difference is caused by the wider range of markets which are available by way of the defendant's line. However, certain of the mines selected by complainant were railway fuel mines.

The complainant states that at the time of the hearing in February, 1924, its mine was getting out more than 50 cars

a day, and it would be very natural for them to divide the tonnage approximately equally between the two railroads. The defendant would thus be furnished with substantial tonnage and sufficient revenue to warrant construction of the connection.

Defendant's exhibit shows that for the period January to November 1923, both inclusive, the mines in southern Illinois on its line shipped 50.67 per cent of their total output to points in Illinois, which includes the Chicago switching district, while the Illinois Central mines in the same district shipped 55.66 per cent of their output to the above destinations. To points in Iowa, Michigan, and Indiana, from defendant's mines there moved 9.26, 3.42, and 11.06 per cent, respectively, of the total output compared with 12.55, 2.13, and 7.37 per cent, respectively, from mines on the Central to points in the same states. The tonnage represented by the above figures moving to Indiana over defendant's line was to a large extent railroad fuel for the New York Central system lines.

Defendant operates between Eldorado and Harrisburg [fol. 145] two tracks which it contends are main tracks, the northernmost of which complainant contends is used as a passing or run-around track, and which on defendant's exhibit is styled passing track. This northerly track extends from a point just north of Eldorado where it leads off of the other track and ends at Harrisburg within the assembling yard. At the present time there are four switch tracks leading into coal mines connected with this track between Eldorado and Harrisburg. It is with this track that complainant seeks a connection, at a point 3.1 miles east of Harrisburg and 4.5 miles west of Eldorado. During the day time and the early evening this track is practically set aside for the movement of coal and empties to and from the various mines, and the remainder of the time it is operated as a double track. From that track eight mines are served and approximately 275 to 280 loads and the same number of empties are moved over it daily. During January of 1924 the largest coal business for a month in the history of the field, 12,483 cars were loaded, and on both these tracks in one 24-hour period there were operated a total of 47 trains. There have also been as high as 25 switch movements in addition to train movements over this track during a 24-hour period. Defendant contends that additional

business could not be handled with these facilities during the peak of business. At Harrisburg defendant maintains a large hump yard, particularly for the classification of loaded cars. Coal produced in the vicinity of Eldoraslo is billed from and classified at Harrisburg. During car shortage periods empty cars are classified at Danville and run direct to mines. If the cars are for mines at Eldorado, they are not taken to Harrisburg. The division superintendent testified that in 1922 cars were being humped at Harrisburg and again at Danville, and that he recommended that additional facilities be installed at Harrisburg to enable classification at that point instead of having cars reclassified at Danville. His recommendation was not approved, although it was claimed that the facilities at Harrisburg were at that time inadequate, and that several of the large companies there dependent upon defendant for service were increasing their coal production. Coal traffic from complainant's mine can now be interchanged with defendant at Eldorado, and defendant states that its facilities are ample to take care of all the traffic that might be offered at that point. This traffic would be classified at Mt. Carmel, located 57 miles from Eldorado, by flat switching. This being so, it is not quite clear why traffic originating on [fol. 146] defendant's line at or in the vicinity of Eldorado could not likewise be classified at Mt. Carmel. The switching limits of Eldorado for operating purposes extend from Eldorado to Carrier Mills. The point at which connection is sought is in this district.

The same questions here involved have been considered by the Illinois Commerce Commission. On November 25, 1922, the Central, the Power Company, and the complainant herein, filed with the State commission a joint petition asking for permission to extend a mine lead track from Dering Mine No. 2 across the tracks of the Central and Power Company to a connection with the defendant. On December 14, 1922, the State commission issued an order authorizing the Central to construct such a track. An application was then made by the complainant in this case to the State commission for an order requiring the defendant to make a switch connection with this proposed track. On petition of the defendant herein the first proceeding was reopened, and consolidated with the latter. After further

hearing before the State commission an order was entered on May 3, 1923, authorizing the construction of a mine lead track by the complainant, but limiting the use of such track to those ordinarily appurtenant to a lead track to a mine. On May 8, 1923, further orders were issued out of the same proceeding requiring the installation of a switch connection with defendant's track, but limiting its use in accordance with the order of May 3, 1923. From these orders an appeal was taken by defendant to the Circuit Court of Saline County, which court issued a stay order on October 3, 1923 pending final decision. On January 11, 1924, the court approved and confirmed the orders of the State commission, and on the same date entered an order staying further proceedings for an appeal to the Supreme Court of the State. On appeal to the Supreme Court of the State, the decision of the Circuit Court was reversed. On petition of complainant herein, the case was reopened for rehearing and is now pending before the Supreme Court.

In asking that we require the defendant to construct a switch connection with its switch track, complainant relies upon paragraph 9 of section 1 of the interstate commerce act. Before our authority under this paragraph can be invoked certain conditions must be observed. The complainant must be the owner of a lateral, branch line of railroad, or a shipper tendering interstate traffic for transportation. The connection must be reasonably practicable, and one that [fol. 147] can be put in with safety, and will furnish sufficient business to justify the construction and maintenance of same.

Defendant contends that complainant is not the owner of a lateral branch-line railroad, because it is not a railroad company and under the laws of Illinois would have no right, power, or authority to construct, own, lease, or operate a branch-line railroad connected with a railway engaged as a common carrier in interstate and intrastate commerce. Defendant further contends that it is not an application for a connection with a private side track which may be connected with a railroad, for the reason that under the law of Illinois a railroad constructed on or across a public right of way, or across a railway engaged in interstate and intrastate commerce, is a public highway, and by connection of the rails of such a railway with the rails of a common car-

rier railway, the railway so connected becomes under the constitution of Illinois a part of the railway public highway of the railway with which it is so connected, and is free and open to the use of all persons for the transportation of their persons and property.

It is contended that the complainant is so located that it cannot construct a private siding connecting its mine with the railway of defendant, because no track could be constructed without crossing public highways and tracks of other public companies. Further, this mine is not located on the railway of defendant, and any track connecting its mine with the defendant's line would necessarily be a connecting railway for the reason that cars could be moved from the rails of defendant over that track and to and upon the main line of the Central. Defendant further contends that the making of the contracts with the Central and the Power Company conclusively establish that the switch track with which the connection is sought is in fact a new railway, and in effect is intended to be an extension of the railways of both the Central and the Power Company into new territory without a certificate of convenience and necessity having first been obtained. Thus these two carriers would invade territory which by its location defendant contends rightfully belongs to it.

The contract with the Power Company provides that for the privilege of crossing its right of way, complainant would grant to the Power Company the right to operate locomotives or electric engines, trains, and cars over said track for the purpose of transporting passengers and freight from and to all points of origin and destination on said mine [fol. 148] lead track, or transporting freight and passengers originating and destined from and to points on the connecting line, and the right to construct on and from said mine lead track and over and upon the right of way of said mine lead track a wye, or other suitable track connection between said mine lead track and the track of the Power Company.

The contract with the Central provided that for the right of crossing over its right of way, the coal company granted to the Central the right to use the track and operate its engines and cars thereover for the purpose of serving the mine or mines of the Wasson Coal Company, located in the

vicinity of the connection of that track with the tracks of the Big Four, including also mines of any other company, or for any other purpose not inconsistent with the use of the track by the coal company, or any other companies permitted by the coal company to use said track. There was a further grant which permitted the Central to construct spur tracks leading out of said track, at the expense of the latter.

Specifically, the defendant opposes the installation of a switch connection or an order from us requiring same on the following grounds: (1) That the building and maintenance of such a track is beyond the scope of the powers granted the complainant by its Illinois charter; (2) that such a track, by reason of the contracts between the complainant and the Central and between complainant and the Power Company, and, under the constitution and laws of Illinois, will become a public track and be a part of the public highway of the railways with which it shall be connected; and that an order requiring the connection sought would in legal effect require an extension of the defendant's line to a point not consented to, and would in effect be a taking of property without due process of law and a denial to it of the equal protection of the law; (3) that the making of the proposed connection would complete a new connecting railway between the Central and defendant without a certificate of public convenience and necessity having first been obtained as required by the Illinois commerce law and the interstate commerce act; and (4) that the connection would not be reasonably practicable, nor could it be put in with safety, nor would it furnish sufficient business to justify its construction and maintenance. The first two contentions are primarily matters for judicial interpretation and they need not be further considered here.

Under the third contention the defendant argues that the construction of this mine lead track comes within the pro- [fol. 149] visions of paragraphs 18 to 21 of section 1 of the interstate commerce act. In other words that it is an extension of the railway of the Central, and that therefore a certificate of public convenience and necessity should first have been obtained. The Central is not here seeking authority to operate over this track. See United States et al. v. Pennsylvania R. R. Co., decided by the Supreme Court

of the United States on November 17, 1924, not yet reported.

Finally defendant contends that the proposed connection would not be reasonaly practicable, but it could not be put in with safety and would not furnish sufficient business to justify the construction and maintenance of same. Defendant maintains that as there now exists a connection with the Central at Eldorado, over which any traffic offered by complainant for movement to a point on or via the defendant's rail would be accepted, the connection here sought is not reasonably practicable. It is asserted that its facilities between Harrisburg and Eldorado are being taxed to the utmost during periods of peak business, and that additional business from this mine would lead to congestion and hinder the service and duty it now owes to shippers along its line. It is admitted that if the traffic were offered at Eldorado it would be willing to receive it.

The track with which the connection is sought has already been described. Complainant's track is not materially different than any of the others, except possibly with respect to the per cent of grade and degree of curvature. The crossing of the Illinois Central is constructed on an angle of 14° 35' and the point of tangent 30 feet west of the Central line of crossing frog, and the end of the curve 1,070 feet beyond the crossing. At two places, one of which is toward the south end of the track and north of the traction company crossing, the grades reach a maximum at 1.5 per cent which defendant considers excessive. At one place in the lead or switch track there is a 9 degree curve, which defendant claims would make operation thereover unsafe. Defendant's witness, however, testified that a 9 degree curve exists on the main line of the Cairo division. The defendant shows that if it is delivered a train of 35 empty cars over this proposed switch and stopped it 800 feet distant from the Power Company line as required by State statute, that the rear end would still be on defendant's main track and would thus tend to foul it. There is nothing in the record, however, to show why it would be necessary to deliver 35 empty cars over this switch track in [fol. 150] one cut. There are now four switch tracks leading to coal mines connected with this track, and defendant claims that an additional connection would materially increase the hazard of operation. To deny the fact that ad-

ditional switches to any track will increase the hazard of operating over that track would be superfluous, but the addition of the proposed switch does not appear to be so disproportionate as to preclude it on that ground.

Defendant's position with respect to the inadequacy of its facilities to handle additional tonnage, and its fear of losing some of its tonnage to the Central if the latter should operate over complainant's track are difficult to reconcile. In 1922 the division superintendent recommended increased facilities for the Harrisburg yard, but it will be noted that, notwithstanding the fact that the facilities at that time were said to be overcrowded, that a maximum tonnage was handled in January, 1924. Again, defendant fears a loss of some of its traffic to the Central, which would offset any traffic delivered to it by complainant. Thus, while claiming its facilities are inadequate, it is fearful of losing some of its business.

In Imperial Wheel Co. vs. St. L. I. M. & S. Ry. Co., 20 I. C. C. 56, we said: "If the prerequisite statutory conditions exist the connection must be made whether desired by the carrier or not." In Schlicher v. Director General, 62 I. C. C., 181, we said: "But as construed by us in several cases, the shipper must con-truct his side track before the carrier is obligated to grant him the switch connection."

We find that complainant's siding has been constructed, that application in writing has been made by complainant for a switch connection therewith, and that interstate traffic has been tendered by complainant within the meaning of Section 1 of the Act; that there will be sufficient business to justify the construction and maintenance of the proposed connection; that the proposed connection is reasonably practicable and can be put in with safety and that it should be constructed and maintained by defendant. No finding or order with reference to alleged damages sustained will be made. This is without prejudice to complainant to pursue such remedy as it may have in a court of competent jurisdiction.

An appropriate order will be entered.

At a Session of the Interstate Commerce Commission, Division 5, Held at Its Office, in Washington, D. C., on the 7th Day of February, A. D. 1925.

[fol. 151] No. 15552

J. K. Dering Coal Company

vs.

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed a report containings its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, that the above-named defendant be, and it is hereby, notified and required to construct, on or before the 12th day of May, 1925, and maintain and operate thereafter, a switch connection between the siding of complainant, J. K. Dering Coal Company, and the line of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the location and description of which properties are more fully and at large set out in the report of the Commission; the expense of such connection to be borne by said defendant.

And it is further ordered, that this order shall continue in force until the further order of the Commission.

By the Commission, Division 5.

George B. McGinty, Secretary. (Seal.)

[fol. 152] EXHIBIT No. 7 TO BILL OF COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 15552

J. K. DERING COAL COMPANY

v.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY

Submitted July 29, 1925. Decided March 1, 1926.

Upon further argument, the findings of division 5 in 96 I. C. C. 143, to the effect that complainant had complied with the provisions of section 1, paragraph (9), of the interstate commerce act, and is entitled to an order directing the defendant to construct and maintain a switch connection between its line and complainant's track, affirmed.

C. B. Cardy for complainant.
Geo. B. Gillespie and D. P. Connell for defendant.

Report of the Commission on Further Argument

By the COMMISSION:

Upon petition of defendant we reopened this case for further argument which has been had. The material facts are stated in the report of division 5, 96 I. C. C. 143, and are not in controversy. They will be restated only in so far as is necessary for a proper understanding of this report. Briefly, complainant, also referred to as the coal company, is the owner and operator of a coal mine served by a branch line of the Illinois Central. This mine is located about 2.5 miles from Eldorado, Ill., at which point the Illinois Central connects with the line of the defendant, likewise referred to herein as the Big Four. A track, some 3 to 3.5 miles in length, has been constructed by the Illinois Central for and at the expense of the complainant from the lead track connecting the mine with the Illinois Central to a point adjacent to the right of way of defendant

about three miles southwest of Eldorado. By these proceedings, commenced January 23, 1924, complainant seeks to have us issue an order, as provided by section 1, paragraph (9), of the interstate commerce act directing the defendant to construct and maintain a switch connection between *its* rails and the track aforementioned. Complainant's track crosses the rails of the Illinois Central and three public highways and also the rails of the Southern [fol. 153] Illinois Railway & Power Company, hereinafter referred to as the traction company, which line, some twenty miles in length, parallels the line of the defendant from Eldorado to Carrier Mills, Ill. Along this route a number of coal mines are located, now served by the defendant only. The point at which the switch connection is sought with defendant is not far from the mine of the Wasson Coal Company. A copy of the contract under which the Illinois Central constructed the track from complainant's mine to the right of way of the defendant is attached hereto marked Appendix A. A contract was also entered into between the traction company and the complainant, whereby the coal company was granted permission to cross the tracks of the traction company, and the latter was given the right to construct a wye between its tracks and the coal company's track and to operate freight and passenger engines and trains thereon, subject to certain prior rights granted to the Illinois Central.

In November, 1922, a joint petition by the Illinois Central, the traction company, and the coal company, was filed with the Illinois Commerce Commission wherein permission was sought to construct and operate a track from the mine of the coal company across the tracks of the Illinois Central and the traction company to a point adjacent to the right of way of the Big Four.

On December 14, 1922, the State commission granted permission to the Illinois Central for the construction of the track across the railways and highways mentioned. A petition was then made by the complainant in this case to the State commission for an order requiring the defendant to make a switch connection with this proposed track. The Big Four was not made a party to the first petition and did not know the petition had been filed until after the entry of the order therein. After the filing of the petition for a

switch connection with the proposed track the Big Four filed a motion to set aside the first order and sought leave to appear and defend against the petition. The first petition was thereupon reopened and consolidated with the petition seeking the switch connection, and they were heard together. At the close of the hearing the petitioners to the joint petition first filed moved to modify the order of December 14 to limit the use of the proposed track to that of a private mine track. On May 3, 1923, an order was entered by the State commission authorizing the construction of a mine lead track by the complainant, but limiting the use of such track to those ordinarily appurtenant to a lead track to a [fol. 154] mine. On May 8, 1923, further orders were issued out of the same proceeding requiring the installation of a switch connection with defendant's track, but limiting its use in accordance with the order of May 3, 1923. From these orders of the State Commission the Big Four appealed, contending that the track when constructed would become a public track, that the State commission had no power to limit the use of the track and that the proposed track was not a private or spur track, but a track connecting three railways and an extension of the lines of these railways which was a matter solely within the jurisdiction of this commission. It was further contended that the contracts between the coal company and the Illinois Central and the traction company constituted leases, and that the coal company had no authority under its charter to build, own, lease, or operate a railroad, and that no such authority could be conferred upon it by the State commission. The issues thus raised were finally adjudicated by the Supreme Court of Illinois in Cleveland, C., C. & St. L. Ry. Co. v. Commerce Commission, 311 Ill., 461, 146 N. E. 696, following which the petition for reargument was filed.

The court held, in effect, that the contracts under which the track under consideration was built and the uses to which that track was to be put constituted an extension of the rails of the Big Four, as well as those of the Illinois Central, and the traction company; in short, that under the contracts between the coal company and the Illinois Central, and between the coal company and the traction company, the track could not be considered as a private side

track or spur. The court also held that as the coal company was already served by a railroad, section 5 of the State constitution did not give it authority to compel a connection with another railroad upon which it is not located "where, as here, such connection would be, in effect, extending the line of the railroad affected"; further, that a coal corporation is not a public utility and "possesses no charter powers to build a railroad." The orders of the State commission were held to be void and set aside.

The Supreme Court of Illinois is charged with the duty of construing the laws of the State of Illinois. Under the laws of that State a private track becomes a public track if and when it crosses a public highway. However, the laws of Illinois and the decision of the Supreme Court of that State in no way affect the character and use of this track in so far as interstate commerce is concerned. We must assume that even though the contracts between complainant, the Illinois Central, and the traction company are [fol. 155] sufficient to give to either of those carriers the right to handle traffic in interstate commerce over this track for the public generally, the fact remains that before either of those carriers could exercise such right it would be necessary to first obtain from us a certificate of public convenience and necessity, as provided in paragraph (18) of section 1 of the interstate commerce act. We have issued no such certificate. It follows that as to interstate commerce no carrier has a right of operation over this track which would change its character from a private track to a public track. We, of course, are not concerned with the character of the track with respect to intrastate commerce.

We affirm the finding of division 5. An appropriate order will be entered.

Order

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 1st Day of March, A. D. 1926

No. 15552

J. K. Dering Coal Company

v.

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company

It appearing, that on February 7, 1925, division 5 entered its report and order in the above entitled proceeding; that by order of May 11, 1925, the commission reopened said proceeding for further argument; and that by order of May 27, 1925, the effective date of the said order of February 7, 1925, was postponed until the further order of the commission;

It further appearing, that further argument having been had and the case submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having on the date hereof, made and filed a report on further argument containing its findings of fact and conclusions thereon, which said report, and report and order of February 7, 1925, are hereby referred to and made a part hereof;

It is ordered, that the said order of February 7, 1925, be, and it is hereby, made effective on May 4, 1926.

[fol. 156] It is further ordered, that this order shall continue in force until the further order of the commission.

By the Commission.

George B. McGinty, Secretary. (Seal.)

Appendix A

This agreement, made and entered into this twentieth day of December, A. D. 1922, by and between the Illinois Central Railroad Company, party of the first part, hereinafter called the Railroad Company, and the J. K. Dering

Coal Company, a corporation, of Chicago, Illinois, party of the second part, hereinafter called the Coal Company, witnesseth:

Whereas the Coal Company operates a coal mine in the vicinity of mile post 118 from East St. Louis, adjoining the right of way and tracks of the Railroad Company near Eldorado, Illinois, and in order to facilitate the handling of its business, desires to construct a track connecting with the lead from the main track of the Railroad Company to the mine tracks serving the Coal Company's mine to a connection with the track of the Big Four at a point about 2¼ miles due south of the connection with the track of the Railroad Company, the location of said track and connection being approximately as indicated in red on the plat hereto attached and made a part hereof; and

Whereas, the Coal Company desires that the Railroad Company construct and maintain said track at the expense of the Coal Company; and,

Whereas, said proposed track will cross at grade the main track of the Railroad Company, and the Railroad Company is willing to permit such crossing, including connection of said proposed track to the track of the Railroad Company, and to construct and maintain said proposed track for the Coal Company;

Now, therefore, The Railroad Company in consideration of the covenants and agreements of the Coal Company hereinafter expressed, hereby grants to the Coal Company the right to lay down, maintain and operate a single track railway of standard gauge over and across its way-lands and tracks at a point about 1,450 feet west of mile post 118, and to connect said track with the lead leading out of the Railroad Company's main track to the mine tracks of the Coal Company, which grant is made subject to the following conditions:

1. Said track shall be constructed upon and across said way-lands and tracks of the Railroad Company, including [fol. 157] its connection with the track of the Railroad Company at such location and in accordance with such plans and specifications as shall have been approved or prepared by the chief engineer of the Railroad Company, and shall

at all times be maintained in first class condition to the satisfaction of said chief engineer, or his duly authorized representative.

2. Notwithstanding the grant herein made, the Railroad Company shall have the right at any time, to change the grade of its roadbed and tracks or to install additional tracks over the track of the Coal Company herein authorized to be laid, and the Coal Company agrees at its own expense, to change the grade of its roadbed and track to conform to the grade of the roadbed and tracks of the Railroad Company, and to assume all expense incident thereto, or to install and thereafter maintain at its own expense, such additional crossing or crossings to accommodate the additional track or tracks constructed by the Railroad Company. The crossing or crossings to be installed by the Coal Company in such event, shall be of the same weight and material as used in the rails of the tracks of the Railroad Company, and of such design, character and quality as shall be satisfactory to said chief engineer.

3. In the passage of trains over said crossing, the trains of the Railroad Company shall have prior right of way over said crossing in preference to trains using or operating over the track of the Coal Company.

4. Whenever the Railroad Company, or the laws of the State of Illinois, or any other lawful authorities shall require a flagman or flagmen to be stationed at said crossing, or shall require said crossing to be protected by signals or gates, or by interlocking and derailing system, or any other safety appliances, in any such case the Railroad Company shall employ, as hereinafter provided, and pay the wages of such flagmen, and shall employ as hereinafter provided, and pay the wages of all persons required for the operation of any such signals, gates, interlocking and derailing plant, or other safety appliances, and shall furnish all supplies and pay all other expenses of operating the same, and after the construction of any such signals, gates, interlocking and derailing plants or other safety appliances, shall repair, maintain and renew the same from time to time as may be necessary, and the Coal Company hereby agrees within fifteen (15) days after the presentation of bills therefor, to repay to the Railroad Company all expense incurred by the

Railroad Company for the purposes mentioned in this paragraph.

[fol. 158] And the coal company shall also, at its own cost and expense, provide and put in place, or cause to be provided and put in place, in accordance with the plans and specifications prescribed by the chief engineer of the Railroad Company, and approved by the Illinois Commerce Commission, or other legal authority having jurisdiction over railroad crossings in said State, all such signals, gates, interlocking and derailing plant or other safety appliances which may be so required at said crossings. Such plans and specifications shall include the preparation and change in the tracks of both parties incident to the application and use of any such signals, gates, interlocking and derailing plants or other safety appliances, the connection of the tracks of both parties therewith and all other things necessary to the proper working of such appliances, and to provide for the protection and operation of the railroads of both parties in connection therewith.

In case the Railroad Company shall construct any additional tracks, switches, crossovers or connections within the limits of said interlocking plant, the Railroad Company shall furnish all labor and material required for additions to or alterations in said plant to include the operation of said additional tracks, switches, crossovers, crossings or connections, and the Coal Company agrees to reimburse the Railroad Company for all expense so incurred, within fifteen (15) days after bill shall have been rendered therefor, plus the percentages on labor and material as provided in Article 6 hereof.

5. The Coal Company shall, at its own expense, procure all right of way required for said track, and secure the necessary permission from governmental authorities to construct, maintain, operate and use said track and make proper arrangements with the Southern Illinois Railway & Power Company and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company over which and with which companies' tracks said tracks to be constructed hereunder is to cross and connect.

6. The Railroad Company agrees after the provisions of Article 5 hereunder shall have been complied with by the

Coal Company, and the payment to it by the Coal Company of the sum of Sixty Thousand Dollars ($60,000.00), to lay and construct said track and furnish all material needed therefor. It is understood and acknowledged that the amount to be paid by the Coal Company represents the entire estimated cost of the work to be done and material to be furnished by the Railroad Company in the construction of said track, and it is agreed that if the actual cost of said [fol. 159] work and material, plus 10% on labor to cover supervision and accounting, and 15% on material to cover freight charges and cost of handling, shall be more or less than said sum, an adjustment shall be made between the parties hereto to the end that the Coal Company shall only be required to pay to the Railroad Company the actual cost incurred by the Railroad Company in laying and constructing said track, plus said percentages.

It is mutually understood and agreed that in the event the Coal Company is unable to arrange for a physical connection between said track and the tracks of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, or be assured of the transportation service of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company for coal produced at said mine, and comply with the provision of Article 5, then there shall be no obligation on the part of said Coal Company to construct or pay for the construction of said track, and all of the obligations imposed by this contract on the respective parties hereto shall be made null and void.

7. The Railroad Company further agrees to maintain said track in suitable condition, furnishing all labor and material required therefor, and the Coal Company agrees within ten (10) days after receipt of statement to reimburse the Railroad Company for all expense actually incurred by the Railroad Company in the maintenance of said track, plus the percentages hereinabove mentioned on labor and material.

8. It is expressly understood and agreed that the employes of the Railroad Company while engaged in the construction and maintenance of said track, and supervision of such work, shall, while so engaged, be considered the sole employes of the Coal Company, and the Coal Company

hereby agrees to assume all liability for death of or injury to such employes, the property of said employes, death of or injury to persons, damage or injury to property whatsoever, which may in any way be attributable to the negligence, acts or omissions of said employes, or the construction or maintenance of said track.

9. All persons employed for the protection, construction and maintenance of said crossing or crossings herein contemplated, or the operation of any such signals, gates, interlocking or safety appliances, shall be deemed the employes of the Coal Company, and the Coal Company agrees to assume all responsibility for the negligence of such employes, and to indemnify and save harmless the Railroad Company from any loss, costs, damage and expense, including at- [fol. 160] torneys' fees, which it may incur or suffer, caused by, growing out of, or in any way attributable to the negligence of such employes.

The Coal Company further agrees to asume all responsibility for, and to indemnify the Railroad Company against, any liability for death of or injury to persons, damage or injury to property, which may be attributable to the construction, maintenance, existence or use of said crossing or crossings, it being understood that said track and crossings to be constructed hereunder are to be used by other Railroad Companies in order to serve the Coal Company's said mine, and that the Coal Company assumes all responsibility and liability on account of the use of said track and crossings by such Railroad Companies as in this agreement provided, the same as if the Coal Company were operating its own engines and cars over said track and crossings.

10. Payment of any bills rendered by the Railroad Company hereunder shall not be delayed on account of any dispute or disagreement, but the disputed items shall be promptly considered and adjusted and in case the claim of the Coal Company shall be found correct, any amounts due the Coal Company on acount of such adjustment, shall be repaid and refunded by the Railroad Company within ten (10) days after such adjustment shall have been made.

All bills rendered by the Railroad Company against the Coal Company for labor and material furnished by the

Railroad Company hereunder, shall include 10% on the cost of labor to cover supervision and accounting and 15% on material to cover freight charges and cost of handling, provided, however, that said percentages shall not apply on the wages of regularly assigned employes stationed at said crossing as flagmen, or to operate interlocking plant or other safety device.

11. As a further consideration for the covenants and agreements to be kept and performed by the Railroad Company herein provided, the Coal Company does and hereby grants to the Railroad Company the right to use said track and operate its engines and cars thereover, for the purpose of serving the mine or mines of the Wasson Coal Company located in the vicinity of the connection of said track with the tracks of the Big Four, including the mines of any other Company or for any other purpose not inconsistent with the use of said track by the Coal Company or any other Companies permitted by the Coal Company to use said track. The Coal Company further grants to the Railroad Com- [fol. 161] pany the right to construct spur tracks leading out of said track, but the expense in connection with such spur tracks shall be assumed by the Railroad Company. The Railroad Company agrees to use said track in such manner as not to unreasonably interfere with the use to be made of same by any other company or companies. The Coal Company further grants to the Railroad Company the right to construct a track connecting with the main track of the Railroad Company and said track to be constructed by the Coal Company hereunder, but all expense in connection therewith shall be assumed by the Railroad Company.

12. This agreement shall continue in force so long as said track to be constructed hereunder shall be used for the purpose of handling coal from said mine or mines of the coal Company, and when said track shall be no longer required for such purpose this contract shall terminate and be of no further force or effect save as to those obligations accruing prior thereto, and the Coal Company shall take up and remove that portion of said track, including the crossing frogs in the tracks of the Railroad Company, as well as any other property of the Coal Company located upon said waylands and restore said track and waylands of the Railroad Com-

pany substantially to their previous condition. If the Coal Company shall fail to make such removal and restoration within ten (10) days after this contract shall have terminated, the Railroad Company shall have the right, at its option, to remove that portion of said track located upon its waylands, including crossing frogs or any other property of the Coal Company located thereon, and restore its waylands and track substantially to their previous condition, at the risk and expense of the Coal Company.

13. Upon termination of this agreement, or when said track shall be no longer required by the Coal Company, the Railroad Company shall have the option of purchasing all of said track indicated in red on the plat hereto attached, and the Coal Company agrees to sell same to the Railroad Company, if it desires to purchase, at a price to be mutually agreed upon, but in no event shall said price be greater than the actual cost to the Coal Company, and if the Railroad Company does not desire to purchase said track, that portion thereof, including said crossings, located on the waylands of the Railroad Company shall be removed therefrom as in the next preceding article hereof provided.

[fols. 162 & 162½] 14. This agreement shall be binding upon the successors and assigns of the parties hereto, but the Coal Company shall not assign, transfer or underlet to any other company or person; any of the privileges herein granted by the Railroad Company, or any interest in this contract, without the consent of the Railroad Company first having been obtained.

15. This contract is made subject to the approval of the Illinois Commerce Commission.

In Witness Whereof, the parties hereto have caused these presents to be executed in duplicate, by their duly authorized officers, the day and year first above written.

Illinois Central Railroad Company, by L. W. Baldwin, Vice-President. J. K. Dering Coal Co., by James D. Pauley, Vice-President.

[File endorsement omitted.]

[fol. 163] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO GIVE NOTICE OF HEARING ON APPLICATION FOR TEMPORARY INJUNCTION—April 8, 1926

And now on this, the 8th day of April, A. D. 1926, being one of the Judicial days of the April Term, A. D. 1926, of the District Court of the United States in the Northern District of Illinois, Eastern Division, comes The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, plaintiff in the above entitled cause, and files its Bill of Complaint in the said cause and it appearing to the Court that in and by the said Bill of Complaint, the plaintiff, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, is asking for a temporary or interlocutory injunction against the United States and the other defendants named in the said Bill of Complaint restraining the enforcement and execution of an order made on the 7th day of February, A. D. 1925 by the Interstate Commerce Commission and any and all other orders issued therein in a proceeding pending before the said Commission, being Docket No. 15,552 and entitled, "J. K. Dering Coal Company, Complainant, v. Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Defendant," said petition before the Interstate Commerce Commission being entitled, "Petition for a switch connection with the rails of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and the rails of the mine track of the J. K. Dering Coal Company in Saline County, Illinois."

And the plaintiff aforesaid, having made and presented [fols. 164 & 164½] its said motion and application to the Honorable Adam C. Cliffe, one of the District Judges of the United States for the Northern District of Illinois, for the said temporary or interlocutory injunction, the said District Judge immediately calls to his assistance the Honorable Evan A. Evans, Circuit Judge and the Honorable James H. Wilkerson, District Judge of this Circuit, in accordance with the statute made and provided in such cases and fixes upon the 17th day of April, A. D. 1926 in Room 677 Federal Building, Chicago, Illinois, as the place where

and at ten o'clock in the forenoon of the said day, as the time when the Court will hear the motion and application of the plaintiff for a temporary or interlocutory injunction as prayed for in the said Bill of Complaint.

And the Court does hereby order that at least five (5) days' notice of the hearing on the said application and motion for a temporary or interlocutory injunction in this case be given to the Attorney General of the United States of America, the Secretary of the Interstate Commerce Commission the Honorable George B. McGinty, as well as to each of the defendants herein as is required by the statute in order that they can appear and resist the said application as they so desire: And that said notice be given to each of the said persons by the United States Marshal, delivering to each of them at least five (5) days before the said hearing, a copy of this order duly attested by the Clerk of the Court.

Enter:

Adam C. Cliffe, District Judge.

[fols. 165 & 165½] In United States District Court

[Title omitted]

Order to Issue Process—April 8, 1926

And now on this 8th day of April, A. D. 1926, being one of the Judicial days of the April Term, A. D. 1926 of the District Court of the United States in the Northern District of Illinois, Eastern Division, comes The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, plaintiff in the above entitled cause and files its Bill of Complaint therein, asking for a temporary or interlocutory injunction against the United States and other defendants named in said Bill and for process to issue to the Marshal of the District of Columbia for service upon the Attorney General of the United States and the Secretary of the Interstate Commerce Commission.

And the Court now orders that the Clerk of this Court do issue process upon the defendant, the United States to the Marshal of the District of Columbia for service upon

the Attorney General of the United States and the Secretary of the Interstate Commerce Commission as in the statute provided.

Enter:

Adam C. Cliffe, District Judge.

[fols. 166 & 166½] In United States District Court

[Title omitted]

Præcipe for Summons—Filed April 14, 1926

To the Clerk of said Court:

You will please issue subpœnaes in the above entitled cause directed as follows:

(1) A subpœnae directed to the Marshal of the District of Columbia commanding him to summon the United States by service upon the Attorney General of the United States and the Secretary of the Interstate Commerce Commission of the United States;

(2) A subpœna directed to the Marshal of the Northern District of Illinois commanding him to summon the J. K. Dering Coal Company at 332 South Michigan Avenue, Chicago, Illinois, the Illinois Central Railroad Company, No. 1, Park Row, Chicago, Illinois, and the Southern Illinois Railway & Power Company, 72 West Adams Street, Chicago, Illinois, impleaded as defendants with the United States;

and oblige.

H. N. Quigley, Genl. Counsel; C. P. Stewart, D. P. Connell, Geo. B. Gillespie, Attorneys for Plaintiff.

To the Honorable Charles M. Bates, Clerk.

[fols. 167-169½] Summons and marshal's return omitted in printing.

[fols. 170 & 170½] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO ISSUE SUMMONS—April 14, 1926

Upon motion of plaintiff's solicitor it is ordered that a subpœna do issue for Mr. A. A. Logue, Civil Engineer, % Chief Engineers Office, Illinois Central Railroad Company, 12th Street Station, Chicago, Illinois, requiring him to attend the trial on Saturday, April 17, A. D. 1926 and bring with him records showing progress of construction of track to the J. K. Dering Coal Mine as of various dates until completion.

[fols. 171 & 171½] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING APPLICATION FOR TEMPORARY INJUNCTION—April 17, 1926

Upon motion it is ordered that leave be and the same is hereby given Blackburn Esterline, Esq., attorney for the defendant, United States of America, to file special appearance for the purpose of challenging and objecting to the jurisdiction of the Court.

And after arguments of counsel and due deliberation by the Court said Special Appearance for the purpose of objecting to the jurisdiction of the Court is overruled, and leave be and the same is hereby given the said defendant to file its answer herein.

And thereupon this cause coming on to be heard upon the plaintiff's petition for a temporary injunction against the enforcement of Interstate Commerce Commission Order in case J. K. Dering Coal Co. vs. The Cleveland, Cincinnati, Chicago and St. Louis Ry. Co., Interstate Commerce Commission Docket #15552.

And after arguments of counsel it is ordered, adjudged, and decreed that the plaintiff's application for a temporary injunction be and the same is hereby denied to which ruling of the court the plaintiff here and now duly excepts.

It is further ordered that Briefs be filed and this cause be and the same is hereby set for hearing 9:30 A. M. April 24th, A. D. 1926.

[fols. 172 & 172½] In United States District Court

[Title omitted]

Appearance of Interstate Commerce Commission—Filed April 17, 1926

To the Honorable the Judges of said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150, we hereby enter the appearance of the Interstate Commerce Commission, as a party defendant, and of ourselves as its counsel, in the above-entitled suit.

E. M. Reidy, Attorney. P. J. Farrell, of Counsel.

[fol. 173] In United States District Court

[Title omitted]

Special Appearance and Answer of the United States—Filed April 17, 1926

United States of America, by its counsel, now comes, not entering its appearance herein, but appearing specially for the purpose of challenging and objecting to the jurisdiction of the Court to proceed to hear and determine the cause and in order to prevent default against it, and for no other purpose, and says:

The jurisdiction of the District Court of the United States for the Northern District of Illinois is invoked, as is alleged, "on the diversity of citizenship" between the petitioner (The Cleveland, Cincinnati, Chicago & St. Louis Railway Company) "a railway corporation organized and existing under the laws of the States of Ohio and Indiana and not of the State of Illinois," and "all said three Illinois corporations (J. K. Dering Coal Company, Illinois Central

Railroad Company and Southern Illinois Railway & Power Company) are citizens and residents of the City of Chicago in the Eastern Division of the Northern District of the United States District Court of the State of Illinois; that all of said three corporations are citizens and residents of the State of Illinois, and there is a diversity of citizenship as between them and each of them, and your petitioner," and "this is a suit of a civil nature in equity between your [fol. 174] petitioner and said three corporations as the substantial parties, and the matter and sum in controversy in this suit between your petitioner and the said three corporations named as defendants exceeds exclusive of interest and costs the sum and amount of $4,000.00."

Except for an order requiring it to answer, no relief is prayed against the United States and no mention is made of the United States in the petition except in the title which does not constitute a part thereof.

The petition seeks to set aside and enjoin an order of the Interstate Commerce Commission and on its face shows it is not a suit against the United States under the urgent deficiencies act of October 22, 1913.

Wherefore it moves to dismiss the petition and prays that an appropriate order be entered.

Blackburn Esterline, Assistant to the Solicitor General, United States Attorney.

[fols. 175 & 175½] *Duly sworn to by Blackburn Esterline. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 176] In United States District Court

[Title omitted]

Answer of the United States—Filed April 17, 1926

United States of America, by its counsel, not waiving its special appearance and answer heretofore filed herein, but insisting upon the same now and at all times hereafter, and

in order to prevent default against it, for answer to the petition says:

First Defense

United States of America, for the First Defense to the petition, says:

The petition is not in compliance with Rule 25 of the Rules of Practice for the Courts of Equity of the United States promulgated by the Supreme Court of the United States, in that the petition contains neither "a short and plain statement of the grounds upon which the Court's jurisdiction depends" nor "a short and simple statement of the ultimate facts upon which the plaintiff seeks relief, omitting any mere statement of evidence."

Wherefore it moves to dismiss the petition and prays that an appropriate order may be entered.

[fol. 177] Second Defense

United States of America, for the Second Defense to the petition, says:

The petition is too vague, indefinite, uncertain and insufficient to require answer in that it sets forth with too great verbosity what is alleged to have been evidence and proceedings before the Interstate Commerce Commission, is argumentative with respect thereto and is not in compliance with either Equity Rule No. 25 or any other form of pleading known to the equity practice and procedure.

Wherefore defendant moves to dismiss the petition and prays that an appropriate order may be entered.

Third Defense

United States of America, for the Third Defense to the petition, says:

That the matters and things set forth in the petition and sought to be put in issue before the Court were all before the Interstate Commerce Commission, were fully heard and determined by it, and were within its power and authority to hear and determine under the provisions of the Interstate Commerce Act; the orders entered February 5, 1925 and March 1, 1926, respectively, in the proceeding entitled "J. K. Dering Coal Co. v. Cleveland, Cincinnati, Chi-

cago & St. Louis Railway Company, Docket No. 15552," were made on a full hearing after due notice to all of the parties and the reports which are made a part thereof state the conclusions of the Commission together with its decision, order or requirement in the premises, and the matters and things of which complaint is made were fully considered and are foreclosed by findings of fact based on substantial evidence adduced by the parties.

Specifically this defendant denies each and every allegation in the petition which charges, either directly or by inference, that any finding of the Interstate Commerce Commission contained in its *its* reports or that the reports in [fol. 178] their entirety are not sustained by substantial evidence adduced by the parties and of which the petitioner herein had full notice.

It alleges that the facts set forth in the reports of the Commission and each and all of the same are true and correct.

It specifically denies—

(a) Any fact or facts alleged in the petition, or any part of the same, which deny, or which seek to deny, any fact or facts found by the Commission.

(b) Any fact or facts alleged in the petition, or any part of the same, which are inconsistent with any fact or facts found by the Commission.

(c) Any and all inferences of fact from any particular fact or facts alleged in the petition, or any part of the same, which seek to deny, or which are inconsistent with any fact or facts found by the Commission.

(d) Any fact or facts alleged in the petition, or any part of the same, which set up, or which seek to set up, matters and things which were not before the Commission.

(e) Any fact or facts alleged in the petition, or any part of the same, which attack or which seek to attack the action of the Commission, and to show facts other than what the Commission has found and declared.

(f) Any allegations in the petition, or any part of the same, which allege that facts were found by the Commission in its report which, as shown on the face thereof, were not so found.

(g) Any conclusions of law alleged and insisted upon in the petition, or any part of the same, which are inconsistent with any conclusions of law held by the Interstate Commerce Commission.

[fol. 179] Wherefore, having fully answered, it prays that the petition be dismissed at the cost of the petitioner and for such other and further order as may be appropriate.

Blackburn Esterline, Assistant to the Solicitor General, United States Attorney.

[fols. 180 & 180½] *Duly sworn to by Blackburn Esterline. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 181] In United States District Court

[Title omitted]

Answer of Defendant Illinois Central Railroad Company—Filed April 17, 1926

The defendant Illinois Central Railroad Company by this Answer sets out its defenses to the claims asserted by the Bill in the above entitled cause so far as it would appear to be involved, as follows:

(1) This defendant says that it was not a party to the proceedings before the Interstate Commerce Commission in the case of J. K. Dering Coal Company, Complainant, vs. Cleveland, Cincinnati, Chicago & St. Louis Railway Company, defendant, No. 15552, as will be disclosed by an inspection of the petition in said proceeding, Exhibit 4, Page 109 of the printed Bill in this cause; Exhibit 6, Page 139 of the printed Bill in this cause, same being the Report of the Commissioner in said proceeding; and Exhibit 7, Page 152 of said printed Bill, same being the Report of the Commission in said proceeding on further argument. Therefore, this defendant respectfully submits that it is not a proper party to this cause which it is advised is for the purpose of testing the lawfulness of the Order of the Interstate Commerce Commission in said proceeding.

(2) This defendant further says that no threat has been made by it and no attempt has been made by it, upon or after the effective date of the Order of said Commission, namely May 4, 1924, to connect this defendant's track or any tracks mentioned in the Bill in this cause with the rails of the plaintiff or to bring about such a connection by any act or acts on its part, and this defendant specifically de-
[fols. 182 & 182½] nies that it has made any such attempt or any threat to do any such act, or participate in doing any such thing.

(3) This defendant stands entirely neutral in the controversy in this cause and specifically denies that it has done anything that would justify this Honorable Court in issuing a restraining order or an injunction against this defendant in this behalf as prayed for in said Bill, and further denies that plaintiff is entitled to any relief against this defendant in said cause.

(4) Defendant specifically denies each and every allegation in said Bill charging or tending to charge this defendant with attempting to do anything or doing anything, or threatening to do anything, in violation of the rights of the complainant.

Illinois Central Railroad Company, by V. W. Foster, John G. Drennan. W. S. Horton, of counsel.

Duly sworn to by John G. Drennan. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 183] In United States District Court

[Title omitted]

Answer of Interstate Commerce Commission—Filed April 17, 1926

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself *al* and all manner of benefit and advantage of exception to the many errors and

insufficiencies in the plaintiff's petition contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering Paragraph I and the first subdivision of Paragraph II of the petition, said intervening defendant, hereinafter called the Commission, admits, for the purposes of this suit, that the allegations of fact therein contained are true, except that the Commission denies that the plaintiff and petitioner, hereinafter called the petitioner, J. K. Dering Coal Company, Illinois Central Railroad Company and Southern Illinois Railway and Power Company are the substantial parties to this suit.

[fol. 184] Further answering said Paragraph II and Paragraphs III to XVI, inclusive, of the petition, the Commission admits and alleges that it made and entered the report and order dated February 7, 1925, and referred to in Paragraph XIV of the petition, copies of which are Exhibit 6 to the petition, in a proceeding then pending before it numbered 15552, wherein J. K. Dering Coal Company was complainant and the petitioner herein was defendant, under authority conferred upon the Commission by the Interstate Commerce Act, particularly sections 1 and 15 of said Act, and that said complaint filed in said proceeding contained allegations and a prayer for relief as shown in Exhibit No. 4 to the petition, which exhibit is referred to in Paragraph X of the petition.

The Commission further alleges that said complaint was duly served upon the petitioner; that subsequent to such service the Commission accorded to petitioner the full hearing provided for in said section 15; that at said hearing a large volume of testimony and other evidence, bearing upon the matters covered by said order of February 7, 1925, was submitted to the Commission for consideration on behalf of the parties to said proceeding, by their respective counsel; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, whereupon the Commission determined

said matters and entered and served upon the petitioner said report and order of February 7, which included the Commission's findings of fact, decision, conclusions, order and requirements, in the premises, and that upon the evidence [fol. 185] aforesaid and as shown in and by said report of February 7, the Commission made the findings and stated the conclusions, upon which said order of February 7 is based.

The Commission further alleges that said findings and conclusions, as set forth in said report of February 7, are as follows:

We find that complainant's siding has been constructed, that application in writing has been made by complainant for a switch connection therewith, and that interstate traffic has been tendered by complainant within the meaning of section 1 of the act; that there will be sufficient business to justify the construction and maintenance of the proposed connection; that the proposed connection is reasonably practicable and can be put in with safety; and that it should be constructed and maintained by defendant.

The Commission further alleges that the body of the order of February 7, based upon said findings and conclusions, is in words and figures as follows, namely:

This case being at issue upon complaint and *an* answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the above-named defendant be, and it is hereby, notified and required to construct, on or before the 12th day of May, 1925, and maintain and operate thereafter, a switch connection between the siding of complainant, J. K. Dering Coal Company, and the line of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the location and description of which properties are more fully and at large set out in the report of the Commission; the expense of such connection to be borne by said defendant.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

The Commission further admits and alleges that pursuant to rehearing in said proceeding, which rehearing was asked for by petitioner and granted by the Commission, the [fol. 186] Commission made and entered the report and order dated March 1, 1926, and referred to in Paragraph XIV of the petition, copies of which are Exhibit No. 7 to the petition; that in said report of March 1, the Commission affirmed the findings included in said report of February 7, and made an order the body of which reads as follows:

It appearing, That on February 7, 1925, division 5 entered its report and order in the above entitled proceeding; that by order of May 11, 1925, the commission reopened said proceeding for further argument; and that by order of May 27, 1925, the effective date of the said order of February 7, 1925, was postponed until the further order of the commission;

It further appearing, That further argument having been had and the case submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having on the date hereof, made and filed a report on further argument containing its findings of fact and conclusions thereon, which said report, and report and order of February 7, 1925, are hereby referred to and made a part hereof;

It is ordered, That the said order of February 7, 1925, be, and it is hereby, made effective on May 4, 1926.

It is further ordered, That this order shall continue in force until the further order of the commission.

The Commission further alleges that said findings and conclusions were and are, and that each of them was and is, fully supported and justified by the evidence submitted to the Commission in said proceeding as aforesaid.

The Commission further alleges that, in making said report and order of February 7 and said report and order of March 1, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention, on behalf of

the parties to said proceeding by their respective counsel, including matters covered by the allegations of the petition herein.

[fol. 187] The Commission further alleges that neither said order of February 7 nor said order of March 1 was made either arbitrarily or unjustly or contrary to the relevant evidence, or without evidence to support it; that in making said order it did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and the Commission denies each of and all the allegations to the contrary contained in said petition.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in said petition in so far as they conflict either with the allegations herein, or with either the findings or conclusions of fact included in said report of February 7, as affirmed by the Commission in said report of March 1. The Commission particularly denies that, as alleged in Paragraph XVI of the petition, the petitioner will suffer either irreparable loss or injury, or suffer either loss or injury of any kind, if said order of February 7 is not annulled and set aside by the court.

All of which matters and things the Commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, by E. M. Reidy, Attorney. P. J. Farrell, of Counsel.

[fols. 188 & 188½] *Duly sworn to by John J. Esch. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 189] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT J. K. DERING COAL COMPANY—Filed April 17, 1926

The defendant, J. K. Dering Coal Company by this its answer sets out in short and simple terms its defenses to each claim asserted by the bill as follows:

I

Upon the face of the bill there is insufficiency of fact to constitute a valid cause of action in equity.

II

The order of the Interstate Commerce Commission which plaintiff prays to have set aside, held for naught and declared void is as follows:

"It is ordered, That the above-named defendant be, and it is hereby, notified and required to construct, on or before the 12th day of May, 1925, and maintain and operate thereafter, a switch connection between the siding of complainant, J. K. Dering Coal Company, and the line of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the location and description of which properties are more fully and at large set out in the report of the Commission; the expense of such connection to be borne by said defendant."

By appropriate orders of said Commission the effective date of said order was subsequently postponed, and is now fixed on May 4, 1926.

This defendant says that the order of the Interstate Commerce Commission entered February 5, 1925, in proceeding No. 15552, entitled J. K. Dering Coal Company, Complain-[fol. 190] ant, v. Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Defendant, and the order entered March 1, 1926, in said proceeding were and are within the power and jurisdiction of the Interstate Commerce Commission, duly invoked in the manner prescribed by law; that such orders rest upon and are justified by findings which are supported by evidence heard upon the issues made by

answer to the petition filed by this defendant in said proceedings, as fully appears from the Exhibits filed herewith and made part hereof as follows: "Exhibit A to answer of J. K. Dering Coal Company," "Exhibit B to Answer of J. K. Dering Coal Company," and "Exhibit C to Answer of J. K. Dering Coal Company"; that Exhibit A is transcript of all the testimony before the Interstate Commerce Commission in said proceeding No. 15,552; that Exhibit B contains copies of all exhibits which were introduced in evidence in said proceeding before said Commission, with certain minor exceptions set out in the affidavit supporting this answer; that Exhibit C contains copies of printed documents filed by the respective parties in said proceeding described as follows:

1. Petition for a Switch Connection with the Rails of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and the Rails of the Mine Tract of the J. K. Dering Coal Co., in Saline County, Illinois.

2. Answer of the Defendant, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, to the Complaint of J. K. Dering Coal Company, Complainant.

3. Abstract, Brief and Argument for Complainant.

4. Brief and Abstract of Defendant.

5. Exceptions to Proposed Report of Director W. P. Bartel and Brief in Support Thereof.

6. Answer to Exceptions of Defendant to Proposed Report of Director W. P. Bartel.

7. Petition for Reargument.

8. Brief on Oral Argument Before the Commission on Rehearing.

9. Answer of Complainant to Brief of Defendant on Oral Argument Before the Commission on Rehearing.

III

No threat has been made by the defendants, or either of [fol. 191] them, nor do the defendants or either of them intend, upon and after the effective date of the order of the

Interstate Commerce Commission, namely May 4, 1926, to connect this defendant's track with the rails of the plaintiff, or to bring about such connection in any manner other than by the due and orderly invocation of the processes of the Courts for the enforcement of said orders and of the penalties provided by law for disobedience of such orders.

IV

Upon the said proceedings before the Interstate Commerce Commission, upon the evidence before said Commission, upon the findings made by said Commission and upon the order entered therein in pursuance of such findings—all of which, under the designation of Exhibits hereinabove set forth, are made part hereof—this defendant prays that plaintiff's bill be dismissed for want of equity.

J. K. Dering Coal Company, by James M. Sheean, Clarence B. Cardy, Its Solicitors. James M. Sheean, Clarence B. Cardy, Solicitors for Defendant J. K. Dering Coal Company.

State of Illinois,
County of Cook, ss:

Clarence B. Cardy, being first duly sworn according to law, on oath states:

He is General Counsel of J. K. Dering Coal Company and duly authorized to make this affidavit on its behalf;

The matters and things stated in the above and foregoing answer are true in substance and in fact;

[fols. 192 & 192½] He had charge of the preparation and presentation of the petition and the evidence in support thereof in proceeding No. 15552 before the Interstate Commerce Commission;

Exhibit A to Answer of J. K. Dering Coal Company is correct and complete transcript of all the testimony before the Interstate Commerce Commission in said proceeding;

Exhibit B to Answer of J. K. Dering Coal Company contains true and correct copies of all exhibits introduced in evidence in said proceeding before said Commission with the exception of three exhibits of which defendant is unable to supply copies but which missing exhibits were respectively as follows:

Complainant's Exhibit No. 3, postoffice receipt showing receipt by C. C. & St. L. Ry. Co. of registered letter containing written request to make track connection;

Defendant's Exhibit No. 24, certified copies of orders of the Circuit Court of Saline County which are described at pages 339 to 341 of the transcript filed herewith as "Exhibit A to Answer of J. K. Dering Coal Company";

Defendant's Exhibit No. 33, map showing lines of Illinois Central, Big Four and New York Central referred to and described at pages 497 and 498 of the transcript filed herewith as "Exhibit A to Answer of J. K. Dering Coal Company";

Exhibit C contains printed complaint of J. K. Dering Coal Company and printed answer of C. C. & St. L. Railway Co., in said proceeding No. 15552 together with true and correct copies of other printed documents filed with the Interstate Commerce Commission in said proceeding by the respective parties;

He makes and files this affidavit in verification of the answer of defendant J. K. Dering Coal Company to the end that the said answer, as thus verified, may be taken and esteemed an affidavit in resistance of the plaintiff's application for a temporary or interlocutory injunction.

Clarence B. Cardy.

Subscribed and sworn to before me this 17th day of April, A. D. 1926. W. S. Jameson, Notary Public. (Seal.)

[File endorsement omitted.]

[fols. 193 & 193½] In United States District Court

[Title omitted]

Motion for Leave to Withdraw Exhibits to Answer—Filed April 17, 1926

Comes now J. K. Dering Coal Company, one of the defendants herein, and moves for leave to withdraw "Exhibit A to Answer of J. K. Dering Coal Company," "Ex-

hibit B to Answer of J. K. Dering Coal Company" and "Exhibit C to Answer of J. K. Dering Coal Company"; and for leave to file in lieu thereof, as of April 17, 1926, transcript duly authenticated by the official seal of the Interstate Commerce Commission of the record (including the testimony and exhibits) in the proceedings before the Interstate Commerce Commission entitled J. K. Dering Coal Company v. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, No. 15552.

J. K. Dering Coal Company, by James M. Sheean, Clarence B. Cardy.

[File endorsement omitted.]

[fol. 194] In United States District Court

[Title omitted]

Answer of Defendant Southern Illinois Railway and Power Company—Filed April 23, 1926

The defendant, Southern Illinois Railway and Power Company, in answer to the bill of complaint in the above entitled cause, insofar as the allegations thereof concern this defendant, sets forth its defense as follows:

1. This defendant says that it was not a party to the proceedings before the Interstate Commerce Commission in the case of J. K. Dering Coal Company, complainant, vs. Cleveland, Cincinnati, Chicago and St. Louis Railway Company, defendant, No. 15552, as is shown by the exhibits attached to and made a part of said bill of complaint.

2. This defendant further says that it has made no threat or attempt, at any time, to connect this defendant's track or tracks mentioned in said bill with the rails of the plaintiff or to bring about such connection by any act or acts on its part, and specifically denies that it has made any such attempt or threat.

[fol. 195] 3. This defendant specifically denies that it has at any time committed any act or done anything which would

justify the issuance of a restraining order or an injunction against it as prayed for in said bill; and it denies that the plaintiff is entitled to any relief against it in said cause.

4. This defendant specifically denies each and every allegation in said bill charging or tending to charge this defendant with any action, or attempted action, or threatened action, or attempt or threat, in violation of the rights of complainant.

Southern Illinois Railway and Power Company, by A. D. Stevens, Its Attorney.

[fols. 196 & 196½] *Duly sworn to by A. D. Stevens. Jurat omitted in printing.*

[File endorsement omitted.]

[fols. 197 & 197½] In United States District Court

[Title omitted]

Order Granting Leave to Withdraw Exhibits to Answer—April 24, 1926

On motion it is ordered that leave be and the same is hereby given the defendant, J. K. Dering Coal Co., to withdraw Exhibits A, B and C to its answer filed herein upon filing in lieu thereof, as of April 17, 1926 transcript of record including the testimony and exhibits in the proceedings before the Interstate Commerce Commission entitled J. K. Dering Coal Co. vs. Cleveland, Cincinnati, Chicago and St. Louis Ry. Co. #15552 duly authenticated by the Official Seal of the Interstate Commerce Commission.

[fols. 198 & 198½] In United States District Court

[Title omitted]

Order Dismissing Cause as to Defendants Illinois Central Railway Co. and Southern Illinois Railway and Power Co.—April 24, 1926

On motion of plaintiff's solicitor it is ordered that the above entitled cause be and the same is hereby dismissed as to the defendants Illinois Central Ry. Company and Southern Illinois Ry. and Power Company.

And thereupon this cause coming on further to be heard upon the Bill of Complaint and the Answer of the defendants thereto and the court now here after hearing all of the evidence adduced and being fully advised in the premises,

It is ordered, adjudged, and decreed that the Bill of Complaint filed herein be and the same is hereby dismissed for want of Equity.

Whereupon, the plaintiff enters herein its motion for an injunction order pending appeal which motion is overruled and denied, to which ruling of the court the plaintiff here and now duly excepts.

[fol. 199] In United States District Court

[Title omitted]

Transcript of Hearing—Filed May 19, 1926

Be it remembered that pursuant to the order of the Court heretofore entered herein the following abridgement of the Reporter's transcript of the hearing herein is here presented for filing in the words and figures following:

Judge Evans: You will have to meet the next issue when it comes, the order of the court today is that application be denied so far as the parties are at issue and we come up to the merits of the case. I don't know what motions may be made and what rulings may be made at that time. It will have to be taken in its order. So long as the bill stands in its present form on its pleadings the three judges will have to sit.

When is the order to be enforced?

[fol. 200] Mr. Gillespie: On the 4th day of May.

Judge Wilkerson: Is there any evidence to offer on final hearing aside from the Interstate Commerce record?

Mr. Gillespie: Some.

Judge Wilkerson: What about? * * *

Judge Evans: Are you ready to put it in now?

Mr. Gillespie: We are not prepared to produce it today. We can do it on a very short day. * * *

Judge Evans: You may have an order referring it to the master for taking that testimony between now and that time if you wish; if not, that is up to you to bring your case on for hearing. All parties have now answered.

Mr. Esterline: They have now all answered.

Mr. Reidy: Your Honor, the record on which the Interstate Commerce Commission has based its order has been introduced in evidence here, and I don't see how any new evidence that might be introduced would change that order of the Commission.

Judge Evans: We don't know either what the evidence is. He wants to correct something.

Mr. Gillespie: When could your Honor set this case for final hearing?

Mr. Sheean: One week from today clearly you should have any proof you want to take between now and that time. * * *

Judge Evans: Only two days that are available at all for any of us here, that's Mondays and Saturdays and the first time would be next Monday, day after tomorrow. * * *

Judge Evans: If so, your right under your appeal would be just as good from this temporary order as from any other. You have a right to appeal direct to the Supreme Court from this temporary order the same as you would have from the final. I said we would be glad to grant a supersedeas. I do not think we should grant a supersedeas because there is not very much damage to you——

Mr. Gillespie: I think, if your Honor please——

Judge Evans: —on the other hand, the view we take is [fol. 201] such that we think you should not—I think you should not be permitted to have a stay. The history, as related, to say nothing of any other facts within the case, indicates that there should be a determination of this thing

once and for all and the shipper should have his connection aside from your legal point. * * *

Judge Evans: Supposing we make this suggestion, that this is the order of the court, that they file their briefs covering these various subjects and we could then set the time.

Mr. Gillespie: We can do that. I can file a brief by Saturday of next week.

Judge Evans: Very well.

Mr. Gillespie: And the time is short. When could the court—can we get any indication when the court could hear us?

Judge Evans: Well, my associates say next Saturday.

Judge Wilkerson: If you go beyond that, why——

Mr. Gillespie: We will be here next Saturday. We will prepare and file a brief and if we conclude to take any——

Judge Evans: We will not take any evidence.

Mr. Gillespie: I say if we conclude to take any evidence between now and then, we will do so.

Judge Evans: If you take any evidence between now and then, you can take it before Mr. Morrison, I will refer it to him now so the master can take the testimony if you want to take any.

Mr. Gillespie: All right, sir. * * * If the court please, on the former hearing my understanding is that the court announced a severance of this bill into two parts, the first of which this court as a three judge court would claim jurisdiction of, and the other part would be saved and separated to be heard by the district court judge, or at least would pend before the district judge. Now, as I understand the proceedings, the J. K. Dering Coal Company is a proper party to the moot proceeding to contest the validity of this order, and, that being so, I would inquire whether that would simply eliminate the part that relates to the Illinois Central and the Southern Illinois Railway and Power Com-
[fol. 202] pany.

Judge Evans: So far as the court acted at all it merely denied your application for a temporary injunction. So far as the discussion went as to the other parties being made defendants we stated that that was not a cause of action which three judges would dispose of. On the face of it, however, we were not advised of anything in the na-

ture of relief obtainable excepting through and under this order to vacate the Interstate Commerce Commission ruling, and if no relief was granted in that respect, then there could be no relief obtained against the other defendants in any respect. So in reality the bill fails if you do not sustain your attack upon the Interstate Commerce Commission's order.

Mr. Gillespie: I understand that, but I had in mind simplification of this record and proceeding in this: The Southern Illinois Railway and Power Company has not filed an answer. * * * I will save you the five dollars. If your Honors please, we will simplify this record by dismissing this bill as to these additional defendants and let it stand simply as a bill to contest the order without prejudice.

Judge Evans: Dismiss it without prejudice. * * *

Mr. Gillespie: Now, if the court please, we on making an effort to assemble the testimony that we hoped to get before the master were not able to do so and there are some items of evidence that we felt were essential that would have been oral testimony, but which we were not able to get within the time prescribed, and we have concluded to waive that part of the case and we have some items here of record evidence that we would like to offer. It will be a very short matter of a very few items of certification.

Judge Evans: All right.

Mr. Gillespie: I desire, if the court please, to complete the picture of the Illinois case for whatever it may be worth for a consideration of this court by offering first a certified copy of the entries, docket entries of the Commission as those cases were carried on the docket of the Commission. There are two items of it which I will offer as Defendant's [fol. 203] Exhibits 1 and 2.

Mr. Sheean: Plaintiff's Exhibits.

Mr. Gillespie: Plaintiff's Exhibits 1 and 2.

Mr. Esterline: I understand these exhibits relate to the proceedings before the Illinois Commerce Commission and the Circuit Court of Saline County and the Supreme Court of Illinois.

Mr. Gillespie: Yes.

Mr. Esterline: On behalf of the Government I object to those as documents that are incompetent, irrelevant and immaterial and having no bearing whatever on this controversy between the Big Four and the Government in a suit

to set aside the order of the Interstate Commerce Commission. In the second place, it does not appear these exhibits were offered to and considered by the Interstate Commerce Commission in the proceeding in which this order was entered.

Mr. Reidy: On behalf of the Interstate Commerce Commission I would like to join in the objection too.

Mr. Sheean: On behalf of the defendant J. K. Dering Coal Company they are objected to upon the ground that the J. K. Dering Coal Company's rights under federal law were invoked under federal statute and that the only issue here involved is what are his rights under the issue federal statutes.

Judge Evans: They may be received subject to objection.

(Said certified copy of docket entries of the Commission, so offered, received subject to objection and marked Plaintiff's Exhibits 1 and 2.)

Mr. Gillespie: Now, we offer a certified copy of certain parts of the record before the Supreme Court of Illinois which includes first the petition, the original petition filed by the J. K. Dering Coal Company in docket No. 12,891, the answer of the respondent, Cleveland, Cincinnati, Chicago and St. Louis Railway Company, to that petition, the petition of the J. K. Dering Coal Company to re-open the case and modify the orders of the Commission, the amended petition of the J. K. Dering Coal Company, the answer to the petition to re-open and modify, the petition for a rehearing, amendments to the petition for a rehearing, notice of appeal, motion for a stay order, copy of stay order, copy [fol. 204] of the order of the Circuit Court of Saline County, the docket orders—that's already been offered—the assignments of error, and the final order of the Supreme Court reversing the case. These documents are offered for the purpose of showing what the issues were in the Supreme Court.

Mr. Esterline: Now, your Honors, may I have the benefit of the same objections which I interposed to the other exhibits without repeating them?

Judge Evans: Yes.

Mr. Esterline: And I will make the pat objection that under the decision of the Supreme Court of the State of

Illinois to which counsel has referred it was held squarely that the Illinois Commerce Commission was without jurisdiction to hear and determine the controversy and to enter the order which it entered, and the documents are objected to for the further reason that they are taken from a proceeding which the Supreme Court by its own opinion held the tribunal was without jurisdiction, and the Supreme Court's opinion will speak for itself on that subject and on what the issue was.

Mr. Reidy: The same objection for the Interstate Commerce Commission.

Mr. Sheean: On behalf of the Dering Coal Company the same objections made to the other offer plus the additional objection that inasmuch as the J. K. Dering rights under the federal statutes had been invoked in accordance with the federal law prior to any decision of the Illinois Supreme Court and, therefore, the decision of the Supreme Court is in no manner competent.

Judge Evans: The same ruling, that is, it will be received subject to the objection.

(Said certified copy of certain parts of the record before the Supreme Court of Illinois under docket No. 12,891, so offered, received in evidence subject to objection.)

Mr. Gillespie: I have obtained here, in order to complete the record of the Interstate Commerce Commission as pre-[fol. 205] viously introduced, certified copies of the orders of the Interstate Commerce Commission in this case and I have also obtained copies of the missing exhibits that are excepted in the answer of the J. K. Dering Coal Company. I apprehend it will not be necessary to offer either at this time, your Honors. The certified copy will, I understand, include it.

Mr. Sheean: It is sufficient that the copy duly authenticated is before the court at this hearing.

Judge Evans: Any other evidence to be offered?

Mr. Gillespie: That is all the evidence we have to offer.

Judge Evans: Any evidence on behalf of defendants?

Mr. Esterline: None for the United States.

Mr. Reidy: None for the Interstate Commerce Commission.

Mr. Sheean: No, your Honor.

Judge Evans: Then the testimony is closed. During the week we received a brief from the Government and one from the plaintiff which I suppose covers the issues. Is that right, Mr. Gillespie?

Mr. Gillespie: Yes, your Honor, that does. Anything that might be added would be an elaboration of the points.

Judge Evans: We listened to the arguments last Saturday and we have all received copies of that brief and I don't think it is at all necessary to argue the case. We are of the opinion that the bill should be dismissed and a decree may be entered accordingly.

Mr. Esterline: Dismiss it for want of equity.

Mr. Sheean: It will only take a minute to write that decree, your Honor.

Judge Evans: The clerk will enter it.

Mr. Gillespie: Now, if your Honors please, in relation to a question of practice, we would like to present to your Honors a motion, with our petition for an appeal, for a stay order, or, rather, an injunction order injoining the force and effect of this order of the Commission pending an appeal and would like to submit some authorities on that subject.

Judge Evans: You don't need to submit the authorities, but what are the circumstances which you think would justify us in granting the stay?

[fol. 206] Mr. Gillespie: Well, the circumstances are these. As was observed by your Honor on last Saturday, there can be no doubt but what there would be irreparable injury to the petitioner.

Judge Evans: Irreparable in the sense that an injunction might be granted to prevent it.

Mr. Gillespie: Yes.

Judge Evans: And waiving the rights of the plaintiff and the defendants as to whether an injunction should be granted there would be irreparable injury to both sides, and the injury to the defendant far greater than your side. All you have to do is to expend a couple of thousand dollars and hook on and then take the revenue when they offer the freight. If, as a matter of fact, that freight interferes with your other business, it does, but that is an irreparable injury but not such a one as we think should outweigh the rights of the Dering Company. I don't know other injury

you are claiming. I don't suppose you are claiming that is injury to your interests down there. You are claiming the legal rights plus whatever damages you may have to subject yourself to by connecting up that track.

Mr. Gillespie: Yes. It would cost, say, about thirty-eight hundred dollars. * * * There would be that and the interference with our business in opening up a main track which is a very active track.

Judge Evans: I don't think the facts in that case would warrant it. There is not any question but what it is discretionary as to whether we should say it or not.

Mr. Gillespie: I don't think there is any doubt, but I call your attention to the fact that whatever your Honors say about this is absolutely binding upon us. We would have no right to make an application to the Supreme Court. That was suggested here last week.

Judge Evans: I am not so sure.

Mr. Gillespie: And if we would have the right to make the application, but Judge Taft in a very recent case held that question had not been passed upon by the lower court that it would be referred back to a three judge court for a consideration, and in that case it is also held, your Honors, that the judge to whom the petition for an appeal shall be [fol. 207] presented has no jurisdiction to consider that question separately from the other judges associated with him on the three judge court. Now, these orders are so far as I have been able to find in the decided cases almost of uniform practice and I can see no damage that would result whatever to the Dering Company from failure to make this statement. * * *

Judge Evans: Supposing you are liable?

Mr. Gillespie: We would lose that. In addition to that, if this track is connected, this Interstate Commerce Commission, of course, has nothing to do with intrastate commerce, but whenever the track is connected and becomes a part of the railway highway of the state under the laws of the State of Illinois, under the Constitution itself, the highest law of the state, that track is subject to use by the public generally and it gives them access to all the mines located on the railway of the Big Four between Carrier Mills and Eldorado, and that is the principal parts of their business.

It gives them an opportunity to immediately invade our field while this thing is pending.

Judge Evans: Your later statement only goes to show the absolute necessity of government regulation. That is exactly what public utilities ought to do, they ought to care for anybody anywhere under all circumstances, and at this late date, 1926, for a railroad to refuse to do something simply because it wants to favor this one or that only goes to make a person see red when it comes to the question of regulation. I cannot understand it. What you get one place you lose in another, but you are the carrier of commerce, that's your only duty.

Mr. Gillespie: That's true, your Honor, from the standpoint of competition which has been done already as the Supreme Court of the United States has said in numberless recent cases; and besides that; if your Honor please, here is a railroad that is peculiarly situated, it has no traffic except coal traffic. If that coal traffic is taken from that rail- [fols. 208 & 208½] road, that railroad is insolvent at once.

Judge Evans: Well, we hold the application should be denied.

Mr. Gillespie: Yes, sir.

Judge Evans: That's all.

[File endorsement omitted.]

[fol. 209] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF PLAINTIFF FOR AN ORDER MAKING THE TRANSCRIPT OF THE HEARING BEFORE JUDGE EVANS, WILKERSON, AND CLIFFE, BEGINNING APRIL 17, 1926, AND CONCLUDED APRIL 24, 1926, A PART OF THE RECORD HEREIN AND TO EMBODY AN ABRIDGEMENT THEREOF IN THE TRANSCRIPT TO THE SUPREME COURT OF THE UNITED STATES—Filed May 19, 1926

And now comes Attorneys for the Plaintiff and move the Court to make an order upon the Clerk herein to file a copy of the Reporter's transcript of hearing herein as a

part of the record in this cause and ordering an abridgement of the same to be embodied in the transcript as a part of the record in this cause, and with this motion the Plain-
[fols. 210 & 210½] tiff tenders a copy of said transcript of the Reporter's notes and abridgement thereof.

H. N. Quigley, Saml. W. Baxter, C. P. Stewart, D. P. Connell, Geo. B. Gillespie, Solrs. for Plff. (Appellant.)

[File endorsement omitted.]

[fols. 211 & 211½] In United States District Court

[Title omitted]

Order Enlarging Time—May 26, 1926

It appearing that the record is voluminous, that counsel for the respective parties are distant, and for other good and sufficient cause shown,

It is ordered that the time within which the plaintiff (Appellant) may docket the case and file the record thereof with the Clerk of the Supreme Court of the United States, be and the same is hereby enlarged to and including August 2, 1926.

Evan A. Evans, Circuit Judge. James H. Wilkerson, District Court. Adam C. Cliffe, District Judge.

[fols. 212 & 212½] In United States District Court

[Title omitted]

Order Enlarging Time—May 26, 1926

It appearing that the record is voluminous, that counsel for the respective parties are distant, and for other good and sufficient cause shown, it is ordered that the defendants and each of them shall have to and including July first, 1926, in which to file objections to the statement or narrative of the evidence filed by the plaintiff and to prepare for submission to the Court a separate statement or nar-

rative of the evidence for the settlement of the record under the direction of the Court or of a Judge thereof.

Evan A. Evans, Circuit Judge. James H. Wilkerson, District Judge. Adam C. Cliffe District Judge.

[fol. 213] In United States District Court

[Title omitted]

Notice of Statement of Evidence

To Honorable Oscar E. Carlstrom, Attorney General, Springfield, Illinois; James M. Sheean, Esq., #1428 Illinois Merchants Bank Building, 231 South La Salle Street, Chicago, Illinois; Clarence B. Cardy, Esq., #1901 McCormick Building, Chicago, Illinois, solicitors for the J. K. Dering Coal Company; Blackburn Esterline, Esq., Assistant Attorney General of the United States, solicitor for the United States, Washington, D. C.; E. M. Reidy, Esq., solicitor for the Interstate Commerce Commission, Washington, D. C.

[fol. 214] Sirs: Please to be informed that the Plaintiff, (Appellant), The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, has prepared a statement of evidence and abridgement of the abstracts and evidence in the above entitled cause and have on this 19th day of May, 1926, lodged the same in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, for your examination. It has at the same time filed with the Clerk of said Court a praecipe of which a copy is enclosed for you indicating the portions of the record to be incorporated into the transcript on its appeal to the United States Supreme Court from the orders and judgment of the said District Court in said cause. It will ask the Court to approve the statement and abridgements of evidence on Friday, June 4, 1926, or as soon thereafter as counsel can be heard.

H. N. Quigley, General Counsel; Samuel W. Baxter, General Attorney; Chas. P. Stewart, Assistant General Attorney; D. P. Connell, Assistant General Solicitor; Geo. B. Gillespie, Solicitors for the Plaintiff (Appellant).

Dated this 19th day of May, A. D. 1926.

[fol. 215] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the above-entitled court:

You will please prepare a transcript of the record in this cause to be filed in the office of the Clerk of the United States Supreme Court in accordance with an appeal of said cause from the orders and judgment of the said Court entered on the 17th day and the 24th day of April, 1926, which said transcript must include the following:

(1) Petition or Bill filed herein by the Plaintiff on the 8th day of April, 1926.

[fol. 216] (2) Notice of application of Plaintiff for preliminary injunction to be heard on April 17, 1926, with return of Marshals showing service on the Attorney General of the United States, Interstate Commerce Commission, J. K. Dering Coal Company, Illinois Central Railroad Company and Southern Illinois Railway and Power Company.

(3) Appearances, answers and motion of the United States, the Attorney General of the United States, the Interstate Commerce Commission, J. K. Dering Coal Company, Illinois Central Railroad Company and Southern Illinois Railway and Power Company entered and filed in said cause on April 17, 1926, and at any time theretofore since the filing of the Bill by the Plaintiff in said cause.

(4) Orders of the Court entered in said cause on April 17, 1926, especially those overruling the special plea of the United States and the Attorney General of the United States by Blackburn Esterline as representative of the Attorney General of the United States, and that denying the prayer and motion of the Plaintiff for a preliminary interlocutory injunction and exceptions thereto, and the motion setting said cause for final hearing on April 24, 1926.

(5) Record showing the proceedings at the hearing and all motions and orders entered by the Court in said cause on April 24, 1926, including the decree dismissing the Petition or Bill of the Plaintiff for want of equity, and an

order denying the motion of Plaintiff for an injunction or restraining order pending an appeal to the United States Supreme Court.

(6) Copy of the Reporter's transcript showing the introduction of evidence and proceedings in said cause in the introduction of evidence and entry of orders in said cause.

(7) The following specific parts of the record of hearing in said cause before the Interstate Commerce Commission:

(a) The original complaint of the Dering Coal Company and the answer thereto of the Defendant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

(The Petition or Complaint appears as Exhibit 4, at page 109 of the petition or bill herein. The answer as Exhibit 5, pages 113-138, including exhibits. These may be included in the record by reference under the provisions of Equity Rules 75 and 76.)

[fol. 217] (b) All that part of the oral testimony of the witnesses heard before the Interstate Commerce Commission by Examiner, Director Bartel, the rulings and statements into the record made by said Examiner as the same are shown by the abridgement made a part of the record herein in accordance with Equity Rules 75 and 76 not including exhibits offered and received in evidence before the Interstate Commerce Commission in connection with said oral testimony.

(c) The following numbered exhibits as abridged, which abridgement is filed with and as a part of the statement required by Equity Rules 75 and 76:

Exhibit No. I.

(Items 1, 2, 3, 4, and 5, of this Exhibit may be included by reference to pages 17 to 21 inclusive of the Plaintiff's Petition or Bill.)

Exhibit No. II.
Exhibit No. III.
Exhibit No. IV.
Exhibit No. VI.
Exhibit No. VII.
Exhibit No. VIII.

(This Exhibit may be included by reference to pages 23 to 35 of Plaintiff's Petition or Bill in accordance with Equity Rules 75 and 76.)

Exhibit No. IX.
Exhibit No. XIII.
Exhibit No. XIV.
Exhibit No. XV.
Exhibit No. XVI.
Exhibit No. XVII.
Exhibit No. XVIII.
Exhibit No. XXI.
Exhibit No. XXII.
Exhibit No. XXIII.
Exhibit No. XXIV.
Exhibit No. XXV.
Exhibit No. XXVI.
Exhibit No. XXVIII.
Exhibit No. XXIX.
Exhibit No. XXX.
Exhibit No. XXXI.
Exhibit No. XXXII.
Exhibit No. XXXIII.

[fol. 218] (8) The record evidence offered and received at the hearing in said cause April 24, 1926.

(9) The Petition for appeal and assignment of errors.

(10) Order allowing the appeal.

(11) Appeal Bond.

(12) The order approving the appeal bond.

(13) Citation and papers relative to the service thereof.

(14) The praecipe for transcript and proof of service thereof.

(15) Order approving record and the lodgment thereof.

(16) Stipulation of counsel for use of the original abridgement of the record in lieu of a transcript thereof.

Dated this 19th day of May, A. D. 1926.

H. N. Quigley, General Counsel; Saml. W. Baxter, General Attorney; Chas. P. Stewart, Assistant General Attorney; D. P. Connell, Assistant General Solicitor; Geo. B. Gillespie, Solicitors for the Plaintiff (Appellant).

[fols. 219 & 219½] I, Oscar E. Carlstrom, hereby acknowledge service of the foregoing præcipe and notice, and consent and agree that the record in said cause may be settled and determined pursuant to said notice on June 4, 1926, in accordance with said notice and præcipe.

Oscar E. Carlstrom, by David J. Jadyk, Ass't Atty. Gen.

[fol. 220] In United States District Court

[Title omitted]

Notice of Lodgment of Statement of Evidence—Filed June 9, 1926

To James M. Sheean, Esq., #1428 Illinois Merchants Bank Building, 231 South La Salle Street, Chicago, Illinois; Clarence B. Cardy, Esq., #1901 McCormick Building, Chicago, Illinois, solicitors for the J. K. Dering Coal Company; Blackburn Esterline, Esq., Assistant Attorney General of the United States, solicitor for the United States, Washington, D. C.; E. M. Reidy, Esq., solicitor for the Interstate Commerce Commission, Washington, D. C.

[fol. 221] Sirs: Please to be informed that the Plaintiff, (Appellant), The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, has prepared a statement of evidence and abridgement of the abstracts and evidence in the above entitled cause and have on this 19th day of May, 1926, lodged the same in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, for your examination. It has at the same time filed with the Clerk of said Court a præcipe of which a copy is enclosed for you indicating the portions of the record to be incorporated into the transcript on its appeal to the United States Supreme Court from the orders and judgment of the said District Court in said cause. It will ask the Court to approve the statement and abridge-

ments of evidence on Friday, June 4, 1926, or as soon thereafter as counsel can be heard.

H. N. Quigley, General Counsel; Samuel W. Baxter, General Attorney; Chas. P. Stewart, Assistant General Attorney; D. P. Connell, Assistant General Solicitor; Geo. B. Gillespie, Solicitor for the Plaintiff (Appellant).

Dated this 19th day of May, A. D. 1926.

[fols. 222-226½] State of Illinois,
County of Sangamon, ss:

Geo. B. Gillespie, being duly sworn according to law on oath says that at the hour of 6:00 p. m., on the 18th day of May, 1926, he deposited in the post office at Springfield, Illinois, postage paid and properly addressed a true copy of the foregoing notice and a true copy of the foregoing precipe for transcript of record in case No. 5733, in the United States District Court for the Northern District of Illinois, Eastern Division, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. United States, and J. K. Dering Coal Company, to the following:

To James M. Sheean, Esq., #1428 Illinois Merchants Bank Building, 231 South La Salle Street, Chicago, Illinois; Clarence B. Cardy, Esq., #1901 McCormick Building, Chicago, Illinois, solicitors for the J. K. Dering Coal Company; Blackburn Esterline, Esq., Assistant Attorney General of the United States, solicitor for the United States, Washington, D. C.; E. M. Reidy, Esq., solicitor for the Interstate Commerce Commission, Washington, D. C.,

who are the attorneys of record for the Defendants (Appellees,) in said cause.

Geo. G. Gillespie.

Subscribed and sworn to before me this 18th day of May, A. D. 1926. Lucy Bowles, Notary Public. (Seal.)

[fol. 227] In United States District Court

[Title omitted]

Objections to Statement of Evidence—Filed July 1, 1926

United States of America, and Interstate Commerce Commission, by their respective counsel, now come and object to the statement or narrative of the evidence filed by the plaintiff on the ground that the same is generally so inaccurate, incomplete, misleading and partisan that the same cannot be brought into conformity with the rules by mere additions or amendments as will obviously appear from a comparison of said narrative with the original transcript on file and as will be more fully pointed out upon the presentation of this motion and the hearing thereof.

Pursuant to the order entered herein on May 26, 1926, these defendants submit herewith separate statement or narrative as a true, complete and properly prepared narrative pursuant to Equity Rule No. 75 and the decisions of the Supreme Court; and thereupon these defendants move that the same be approved by the Court.

Blackburn Esterline, Assistant to the Solicitor General; P. J. Farrell, Edward M. Reidy, Solicitors for Interstate Commerce Commission.

[fols. 228 & 228½] In United States District Court

[Title omitted]

Objections to Statement of Evidence—Filed July 1, 1926

Now comes J. K. Dering Coal Company, one of the defendants, and objects to the statement or narrative of the evidence prepared by the plaintiff on the ground that the same is generally so inaccurate, incomplete, misleading and partisan that the same cannot be brought into conformity with the rules by mere additions or amendments.

And this defendant, having examined the separate statement or narrative of the evidence prepared by the intervening defendant Interstate Commerce Commission under the order entered on May 26, 1926, giving defendants to and

including July 1, 1926, in which to prepare for submission to the Court such separate statement or narrative of the evidence, and having found, upon such examination, that the separate statement so prepared by said intervening defendant is true, complete and properly prepared in conformity with the rules, now moves that the same be approved by the Court.

J. K. Dering Coal Company, by James M. Sheean, Clarence B. Cardy, Solicitors for Defendant J. K. Dering Coal Company.

[fol. 229] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ABRIDGEMENT OF RECORD—Filed July 1, 1926

Be it remembered that on the date endorsed hereon as the file mark by the Clerk of the United States District Court, the Plaintiff, Appellant herein, lodged in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, an abridgement of the record herein in accordance with the provisions of Equity Rules Nos. 75 and 76 as follows:

Copy of complaint and answer thereto before the Interstate Commerce Commission;

Testimony of witnesses heard by the Examiner, Director W. P. Bartel;

Exhibits introduced in connection with testimony of witnesses and by counsel before the Examiner, Director W. P. Bartel of the Interstate Commerce Commission;

Proceedings before the Interstate Commerce Commission;

Additional evidence offered at final hearing in United States District Court.

[fol. 230] IN UNITED STATES DISTRICT COURT

Statement of Evidence Before the Interstate Commerce Commission

Docket No. 15552

J. K. DERING COAL COMPANY, Complainant,

vs.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Defendant

Narrative Statement of Testimony Introduced at Hearings Held on February 15, 16, and 18, 1924, at Washington, D. C., Before Director Bartel

Appearances: Mr. C. B. Cardy, for complainant; Messrs. George B. Gillespie, H. N. Quigley, and D. P. Connell, for defendant.

[fol. 231] [Title omitted]

COLLOQUY BETWEEN COURT AND COUNSEL

Statement by Director Bartel

In this complaint the complainant asks that the defendant be required to cease and desist from violating the Act, and to construct, maintain and operate on its own right of way in Saline County, Ill., between Harrisburg and Eldorado, Ill., a switch connection with a track of complainant under such reasonable terms and conditions as found justifiable, and to be permitted to accept coal tendered and delivered over this connection, and to furnish cars for the movement to the best of its ability without discrimination.

It also asks by way of reparation all damages sustained by complainant for violation of the Act from December 1, 1923, to the date the order of the Commission is made effective.

Mr. Cardy: That is a substantially correct statement of the issues. (Tes. 2-3.)

Mr. Gillespie: That is not a statement of the issues, as I understand it. The real issue in this case is one not of serv-

ice, but is one of the power and authority, first, of the Der-
[fol. 232] ing Coal Company to own and control a railroad track which furnishes a connecting railway between two operating railroads; secondly, it involves the question of whether the Dering Coal Company, located as it is, on the Illinois Central Railroad, 2½ miles from a connection of that railroad with the Big Four Railroad, which has been in operation for some 15 or 20 years, and through which deliveries can be made from the Dering mines to the Big Four Railroad, is in a position to claim that it is an industry on the railway of the Big Four Railroad Company and entitled to the benefits of section 1 of the Interstate Commerce Act. In the third place, the scheme that is devised by the Dering Coal Company is co-operated in and is furthered by certain contracts that were entered into between the Dering Coal Company and the Illinois Central Railroad Company, the Dering Coal Company and the Southern Illinois Railway & Power Company, to extend the rails of those two companies by building this intermediate connection and operating it in extension of both railroads for the purpose of transportation of passengers and freight as between those railroads, and incidentally connect with the Big Four Railroad at a point known as Wasson Mine No. 1, and also transport coal back and forth between the Illinois Central and the Wasson mine and between the Illinois Central and the Big Four Railroad, which is, in effect, as this Commission decided in a previous case, an extension of the Big Four Railroad to the Dering mine, and also an extension of the Illinois Central Railroad to the Wasson mine on the Big Four. We contend that there is no power under the laws of the State of Illinois for either of these railroads under their charters to extend their lines into new fields, without statutory authority. The only statutory authority under which such an extension can be made is, so far as the State of Illinois is concerned, the obtaining of a certificate of convenience and
[fol. 233] necessity for that purpose, and so far as the Interstate Commerce Commission is concerned, the obtaining of a certificate of convenience and necessity for that purpose.

Those are, in brief, the real issues involved in this case. (Tes. 3-5.)

Mr. Cardy: On the first proposition with reference to the issues, the Examiner, I believe, clearly stated the issue as disclosed by the complaint and answer. The matters stated by Mr. Gillespie are mere defenses to the issue as raised by the answer and complaint. (Tes. 7.)

JAMES B. PAULEY was called as a witness on behalf of the complainant and, having been first duly sworn, testified as follows:

Direct examination:

My name is James B. Pauley; I am vice-president of the J. K. Dering Coal Company, and have been connected with that company somewhat over 7 years.

The J. K. Dering Coal Company is an Illinois corporation, operating mines in the Clinton District of Indiana, and in Saline County, which is in Southern Illinois. They are producers, distributors and sellers of bituminous coal, with principal offices in Chicago. Its mine in Saline County is located 2½ miles west of Eldorado.

Referring to the plat on the first page of the complaint in this proceeding: This plat does not show a scale, but it shows the location of the property with reference to the city of Eldorado, with reference to the Illinois Central, to the Big Four, and to the Southern Illinois Railroad & Power Company, the latter being a traction line. The shaded portion on the map is the property of the Dering Coal Company, and the red line running from the point marked Mine No. 2 to the right-of-way of the Big Four shows the switch track which has now been built and which we are now asking to be connected with the Big Four Railroad.

[fol. 234] The right of way upon which that track is laid is owned by the Dering Coal Company and that company purchased and paid for the property upon which it is located. That property is a part of the mining property of the Dering Coal Company upon which the track is laid. (Tes. 7-9.)

Originally the Dering Coal Company purchased approximately 3,700 acres of coal lands, of which approximately 3,400 acres still remain unmined. Approximately 28,000,000

to 30,000,000 tons of bituminous coal are available for mining from this property. The property stands on our books today at approximately $1,700,000. 21,000,000 tons is approximately the amount of the Fifth Vein coal available. Overlying the Fifth Vein coal is found the Seventh Vein in minable quantities, and which at some time we expect to mine through that shaft, the difference being the Seventh Vein coal. When I stated from 28,000,000 to 30,000,000 I meant the total available coal in both seams which we expected some day to mine through that shaft. The tons of coal that are available from the seam in which the company is now working will be 21,000,000 tons.

The development, the shafts, and all of the equipment were figured by our engineers upon the basis of the capacity of 4,000 tons per day. I would say that mine at its potential capacity should easily and regularly produce 3,500 tons per day. (Tes. 9-11.)

The mine has not reached its full potential capacity of coal. At the present time we have development, that is to say, working places below, to produce 3,500 tons. This field of coal, as already estimated, is a very valuable one, and the mine was equipped and developed to produce the maximum tonnage we believe to be economical from a vein of that height. That is to say, from coal of that thickness. I believe the vein in this particular locality to be thicker than the average of the Saline County field. The coal, in quality, [fol. 235] is at least as good as any mine in Saline County, and in building this mine we put in the best and most modern equipment to easily produce the tonnage estimated at the most favorable cost possible, and left nothing undone in the way of facilities for production and preparation. This mine comes in competition with the best mines in the State of Illinois, and in completing it we had in mind that it would be strictly a modern mine, in order to compete. It is not the largest mine in Saline County; there is one other mine there which I would say has approximately the same potential tonnage as this mine. One other mine possibly has the same tonnage. With that exception there is now no mine that compares with it. This is one of the three best mines, most modern mines with the largest capacity, located in Saline County. (Tes. 11-12.)

Referring again to the plat shown in the complaint, there is constructed on the right of way or the lines extending from the J. K. Dering Coal Company's property to the Big Four a switch track. That track was constructed by the J. K. Dering Coal Company and paid for by the J. K. Dering Coal Company—the cost of the materials, supplies, etc. The J. K. Dering Coal Company is the sole and only owner of the right of way and the track. Between the months of May and September, approximately, 1917, we optioned, drilled, examined and purchased the acreage already given.

About or prior to the time of the acquisition of the property and the location of the mining shaft, we had negotiations with the defendant and Illinois Central with reference to the transportation service and transportation facilities for serving this mining property. (Tes. 12-13.)

Mr. Card: I might introduce here copies of letters that Mr. Pauley will refer to, and I will ask that this correspondence be marked Complainant's Exhibit No. 1. There are 9 pages.

Mr. Gillespie: We object to this correspondence upon the [fol. 235½] ground that it was correspondence in relation to the agreement between the Illinois Central, the Big Four, and the Dering Coal Company to treat this mine, the Dering Mine No. 2, and Dering mine No. 3, located on the Big Four Railroad, as both joint mines on the two railroads. The question was finally presented to this Commission and the Commission held that they were not entitled as a matter of right to have any such an arrangement as that carried out for the reason that it would, in effect, require the Big Four to extend its rails to the Dering mine on the Illinois Central, and the Illinois Central, in effect, to extend its rails to the mine on the Big Four, and that the Commission would make no such order. Another reason why this correspondence is not pertinent or material at this time is that Dering Mine No. 3 that was located on the Big Four Railroad is no longer in existence, and any correspondence or conversations they had in relation to the matter at that time would not be applicable to the present situation. (Tes. 13-14.)

(The correspondence mentioned was marked Exhibit No. 1 for identification.) (Tes. 15.)

Mr. Pauley: About the time the first parcel of this 3,700 acres was under negotiation and option I went to Cincinnati, called upon Mr. Worcester and stated to him the plans we had for a mine and asked him if he would be willing to make some arrangement with the Illinois Central to give us joint service. I had a conference with Mr. Worcester with reference to obtaining service of the Big Four Railroad to serve this mine prior to the actual location of the shaft. Page 1 of Exhibit No. 1 is a confirmation, in effect, of the conversation I had with Mr. Worcester. The purpose of my conference with Mr. Worcester prior to receiving this letter was to obtain his consent to give us joint service. As [fol. 236] to why we felt we needed the service of the Big Four at this mine: From our knowledge of conditions in that section and knowing that the Illinois Central at that point operated a branch line from Duquoin to Eldorado, we knew they were not in a position to give us the service required for a mine of that size. The property was actually acquired by the coal company—we were negotiating for the first parcel—about the time we had these conferences with Mr. Worcester. (Tes. 16-17.)

These conferences had something to do with the location of the mining shaft where it was finally determined to be located. We located the shaft at the most advantageous point from the standpoint of the topography of the land. The shaft did not have to be located at this particular point. Had we not believed we had the consent of both railroads to give us service the shaft could have been located south of the Illinois Central where it would not have been necessary to cross the Illinois Central in order to reach the Big Four. As to the importance of determining actual transportation conditions in the location of a mining shaft: In determining the location of a mine site there are three or four fundamental and important considerations. I would say, first, the existence of coal; second, transportation facilities to ship the coal after it is mined; third, the labor supply, and fourth, the water supply. There are many other things to be considered, but those four elements would have to be first investigated, and although given in different orders, any one of these is essential to the operation, and without any one of them you could not have a mine. (Tes. 18-20.)

The complainant would not have invested money in the mining property here under consideration had it not been assured by the defendant it would have service and would be able to obtain service from that company in the mining [fol. 236½] and shipping of its coal. The mine in question reached the approximate tonnage referred to in letters 1 and 2 in the summer of 1919. I took up the question of obtaining service from the Big Four Railroad at that time. We pressed the Big Four to consummate the agreement we understood we had with them to bring about a reciprocal switching arrangement with the Illinois Central which latter road was agreeable to this arrangement. About that time several officials or representatives of the Big Four Railroad took up with us this question, representing Mr. Worcester, and objected to making this reciprocal switching arrangement. Mr. Brister, who I understood at that time, was vice-president in charge of traffic of the Big Four, proposed instead of effecting the arrangement as previously agreed upon, there should be a switch track built connecting our mine with the Big Four track. This then went so far that an engineering corps of the Big Four in charge of an engineer named Herman, I believe, came to Eldorado and working in connection with our mine engineer, laid out a tentative switch track similar to the one we have now built. (Tes. 20-22.)

(A letter and plat was marked for identification Exhibit No. 2.) (Tes. 23.)

The plat attached to this exhibit represents the suggested switch track laid out by the Big Four corps of engineers in the month of July, 1919. This plan was suggested by Mr. Brister in lieu of any reciprocal switching arrangement that might be made with the Illinois Central as agreed to by Mr. Worcester.

Mr. Gillespie: I object because it is not shown that Mr. Brister had any authority to make any agreement or that he was then acting for the corporation, the Big Four Railroad. He was then at that time, as the date will show, in active charge of the railroad, operating it for the United States Government.

Mr. Pauley: Mr. Gaynor, who signed this letter, which is dated July 24, 1919, was our chief engineer at the mine, and

[fol. 237] it was received by me as his superior in the usual course of business. Attached to that was this plat. The suggestion was made by Mr. Brister that we would buy the right of way, advance the money for the construction, and that the cost would later be refunded to us at so much per car, $1.00 or $2.00 per car. I agreed to that and the matter was put up by Mr. Brister to his people in New York. (Tes. 23-25.)

Mr. Gillespie: I move to exclude that evidence because the conclusion is that it was not approved. It is a mere negotiation, and could not have any effect on any of the rights of the parties. You cannot say the defendant is represented by some subordinate officer who has negotiated tentatively and recommended to the corporation a proposition that it refuses.

Director Bartel: The record will so show and we will let it go in for what it is worth.

Mr. Pauley: Generally speaking, the only difference in the layout shown on Exhibit No. 2, and the layout as the present track is constructed is in the location. It is perhaps a half-mile farther east—three-quarters. Outside of being a half-mile farther east there is no material difference. The connections are about the same at both ends; the topography of the land at that location is approximately the same. As to what finally became of this tentative agreement: The Big Four later declined to proceed in accordance with their original suggestion. That is to say, the suggestion that we pay and be reimbursed. (Tes. 25-26.)

Director Bartel: Let me see if I understand this. You had these negotiations with Mr. Brister during Federal control and he was acting as an officer for the United States Railroad Administration. After the railroads were turned back the Big Four declined to enter into these agreements. Is that right?

Mr. Pauley: I believe the Big Four declined to proceed [fol. 238] during the time of the Federal Administration. At least it was about September 10, 1919, when this official declination was made.

Mr. Cardy: That was during Federal Control. I will admit it was during Federal control that the Big Four Railroad or the Railroad Administration refused to proceed with this matter. They stated in the letter that they did not

make any expenditures during the period of Federal control. That was in September, 1919.

Director Bartel: We will take cognizance of these unsworn statements. (Tes. 26-28.)

Mr. Pauley: Following word from the Railroad Administration that they could not proceed with this plan, it is a fact that the complaint in the Dering Coal Company case was filed. That case was decided adversely to the complainant on June 17, 1921. All the matters we have discussed up to this time were during Federal control. We had it up with the Big Four after Federal control.

Director Bartel: The declination after Federal control led up to the filing of your complaint?

Mr. Cardy: Yes. This complaint Mr. Pauley referred to was filed September 10, 1919, and decided in June, 1921—the old Dering Mines case. It was filed during Federal control and not after, I believe. (Tes. 28-29.)

Mr. Pauley: The citation on that is 62 I. C. C., 265. After the decision in the Dering Mines case, there were further negotiations with the Big Four Railroad with reference to the switch track connection. These were in October, 1921, and were had with Mr. Stevenson, representing Mr. Worcester. I had a conference with Mr. Worcester also, and the result of that conference was reduced to writing. The letter dated October 22, page 3 of Exhibit No. 1, shows the result of that conference. Page 4 of the exhibit sets forth the in- [fol. 239] formation in respect to the matter set forth on page 3, and page 5 is a further confirmation of this same negotiation by Mr. Stevenson. All of these letters were received by the J. K. Dering Coal Company in the usual course of business and I have the originals in the files here. These are true and correct copies.

After November 1, 1921, we immediately took steps to obtain options on a satisfactory right of way to carry out the plan agreed upon. $33,000 is my recollection of the amount of expenditures made by the J. K. Dering Coal Company in the actual acquisition of the right of way from its mine to the Big Four right of way as shown on this plat. All of that money was paid by the Dering Coal Company in the acquisition of the right of way. Track construction was started in the late summer or early fall of 1923. After the acquisition of the right of way I had further conferences

with the Big Four Railroad or officials as to where the connection ought to be made. I had that conversation with Mr. Worcester; I cannot fix the date. We took options on a certain right of way and after we had those options and had had a survey made and had it platted, I took it to Mr. Worcester's office in Cincinnati and laid it before him for his approval. That was very likely some time in the year 1922. There was an arrangement made at that time to send a man from the Engineering Department of the Big Four to meet an engineer of the Coal Company on the ground. That was perhaps 2 or 3 weeks after the conference I had at Cincinnati. Following my conference with Mr. Worcester, we had a meeting on the ground at Eldorado with a Big Four engineer and the engineer of the Coal Company. I would say that meeting was along some time in 1922. It was a short time after we had acquired options on the right of way and laid out the plan for construction of a switch track. That plan was submitted to the Big Four man on the ground. We had notice he was to be there and I was at the mine the day he arrived. I talked with him, together [fol. 240] with our superintendent and engineer. I showed him a blueprint of the proposed switch track, and according to my recollection, gave him one of the blueprints. I am not sure of that. We drove him by automobile from the mine down near the point of connection with the Big Four. We showed him where the proposed line would come in across the Illinois Central and enter our mine tracks; pointed out to him on the blueprint as well as on the ground, the line this would follow. (Tes. 29-34.)

After the acquisition of the right of way and construction of the track, the Big Four refused to make the connection with the track as constructed; I could not fix a date for that refusal; they have refused many times. It has been almost continuous since the acquisition of the right of way.

Mr. Cardy: Attached to Exhibit No. 1, pages 6, 7, 8, and 9, are notices to the Big Four, written notices, demanding a connection as required by the Act. They are admitted in the answer, as I understand it, as being received. We have here the original receipt from the post office showing acknowledgement of them. I personally mailed out these letters and I do not believe there is any question about the re-

ceipt of notice as to pages 6, 7, 8 and 9 of Exhibit No. 1. I have the original receipts here from the post office showing you received them, and you admitted them in your answer. (Tes. 34.)

Complainant in this proceeding made a written demand upon the defendant for a physical track connection with the track as constructed and shown in complainant's complaint. The formal demand was made on December 22, 1922. Copy was sent to Mr. Worcester. Other demands were made on December 27, 1922, and January 18, 1924. Those letters were sent by registered mail. The document you now hand me is a receipt from the post office showing a receipt of the delivery of the letter to Mr. Worcester which was dated January 21, 1924. (Tes. 35.)

[fol. 241] Mr. Cardy: I offer in evidence Complainant's Exhibit No. 1, 9 pages, and the document I just handed to Mr. Pauley, to be marked Complainant's Exhibit No. 3.

Mr. Gillespie: You had better state them separately.

Mr. Cardy: I offer Complainant's Exhibit No. 1, 9 pages.

Mr. Gillespie: I object to it on the grounds already stated in the record.

Director Bartel: Exhibit No. 1 will be received in evidence.

Mr. Cardy: I offer in evidence Complainant's Exhibit No. 3, which is a receipt from the post office at Chicago, showing the receipt of the registered letter.

Mr. Gillespie: I object to it on the ground that he was not in a position to serve any notice of that kind for the reason that if he has a switch track it has been built in violation of the law and in contempt of the courts.

Director Bartel: That is another question. This is offered as a receipt to show that notice was served on you.

Mr. Gillespie: I do not know.

(The receipt mentioned was received in evidence as Complainant's Exhibit No. 3.)

Mr. Cardy: I would like to introduce complainant's Exhibit No. 2, consisting of a letter and a plat.

Mr. Gillespie: I object to that because it is a letter written by his engineer. It is a self-serving declaration and is not verified. There is no evidence to show that it is written by this man, or that he had any authority to write it. It

is simply not competent for the record in any view you take of the case.

Director Bartel: It will be received subject to your objection. I do not think it is of any particular importance, at any rate.

(Complainant's Exhibit No. 2, was received in evidence.) (Tes. 36-38.)

[fol. 242] Mr. Connell: When was this complaint filed, Mr. Cardy? When was this mailed to the Commission?

Director Bartel: It was received by the Commission January 23. That was when it was filed.

Mr. Cardy: It was actually forwarded to the Commission at that time, January, 1923. I knew when I filed this complaint that the Big Four had received this notice for a switch connection because I sent one on December 22, at an earlier date—because on December 27, 1922, a similar notice was sent. I have proven it was mailed by Mr. Pauley—under his supervision and direction, and I will dig up the acknowledgement of the receipt. If you are raising any objection I will take care of that.

Director Bartel: Does the defendant raise the objection that the copy of this notice was never received by it?

Mr. Connell: I do not know whether it was or not. It strikes me as kind of funny that the notice was not received until after the complaint was filed with the Commission.

Director Bartel: If there is any question it is a legal question and one for the briefs.

Mr. Pauley: The switch track shown on plat No. 1 was actually constructed. I have before me a blueprint and profile showing the actual layouts.

(The blueprint and profile mentioned were marked for identification, respectively, Complainant's Exhibits Nos. 4 and 5.)

Exhibit No. 4 shows at the north end our mine track system. It shows in red then the beginning of the switch track we are now discussing. It shows the land line it follows to the S. I. R. & P. electric line, which it crosses. Then shows the ultimate connection point with the right of way of the Big Four. The track from the mine to the right of way of the Big Four was actually completed and laid to move cars thereon within the last few days.

[fol. 243] The final finishing touches upon it have been made within the last few days. It was completed to such an extent at the time we made the application for switch connection that the switch connection could have been made at that time. There have been cars moving over it for some time. I do not know exactly how long. The track was not constructed in 1922, but we made a demand for a switch connection without having a track in 1922. In 1924, when we made a demand for a switch connection, the track was actually constructed up to the point where the switch connection was to be made. (Tes. 38-42.)

(Exhibits Nos. 4 and 5 were offered in evidence, objected to because immaterial, and received as Complainant's Exhibits Nos. 4 and 5.)

(Exhibit No. 6, 14 photographs, was offered and received in evidence.)

The switch track on leaving our mine, switch system at the north end, crosses the Illinois Central Railroad. Then it follows the quarter section line crossing, I believe, two highways; at least two highways. Then it crosses the electric line and goes up to the right of way of the Big Four.

The first two photographs on Exhibit 6 have no particular bearing on this switch track. They simply show to anyone who is familiar with mines the kind of a mine we are reaching with this track. The third photograph shows from our mine switches the crossing of the Illinois Central Railroad. I think these photographs are all self-explanatory with the note at the bottom. My third photograph shows the switch track crossing the tracks of the Illinois Central Railroad. The switch track does not connect in any way with the tracks of the Illinois Central; it crosses them. The track extending from the Illinois Central running into the mining property is owned by the Dering Coal Company, and the Illinois Central only owns that along the right of way. (Tes. 42-45.)

[fol. 244] Mr. Gillespie: I object to that. It is immaterial who owns it. It is a public track.

Mr. Cardy: I merely want to show there is no connection between this switch track and the tracks of the Illinois Central. The third photograph shows there is not a connection.

Mr. Pauley: The Dering mine is located on the right hand side of this photograph No. 3. The track that does connect with the Illinois Central right next to the crossing is the lead track from the Illinois Central to our mine system. Both of those tracks finally get into our track system. I cannot tell you how far it is from the frog where this track leading to the Big Four runs into this lead track, connects with the Illinois Central. It is off the right of way of the Illinois Central and on the property of the Dering Coal Company. That is shown very clearly in my next photograph—the view taken the other way. There is no connection between this switch track and the Illinois Central main track where the Illinois Central could use this switch track without going over the property of the Dering Coal Company.

Mr. Cardy: We do have a connection with the Illinois Central, but in making that connection you have to go on the property of the Dering Coal Company. (Explained off the record.) (Tes. 45-47.)

Mr. Cardy: It is a physical possibility for the Illinois Central to take traffic to and from this particular switch track by entering the property of the Dering Coal Company, but it is not a legal possibility because the contract does not cover that.

Mr. Gillespie: It certainly is a legal possibility.

Mr. Pauley: Referring to the last 2 or 3 pictures, showing the connection or the track as near the right of way of the Big Four and as to why we have 2 tracks there instead of only one: We put a second track so we might, if necessary, take delivery of cars from the Big Four Railroad, [fol. 245] empties, and at the same time put on a string of loads on the other track. In other words, between the traction line and the Big Four Railroad where we own all the land we have provided what I think a railroad man would call a passing track. The double track is put there to facilitate the service of the Big Four Railroad. The double track gives additional room in case they want to put in more cars at one time than one track will hold. There is a second track for it. In bringing the loaded cars down before they are pulled out by the Big Four we could store both of those tracks full so the Big Four could take them off.

The double track extends from near the crossing of the traction line to the point of connection with the Big Four. It is double track all the way. (Tes. 47-49.)

I am generally familiar with the construction of mine tracks or the nature of mine tracks that serve mines in Illinois and Indiana. I became familiar with them by walking over them; seeing them in operation. At one time I had charge of the management of the Ogara Coal Company—over a period of approximately 2 years—from about April, 1917. At that time they had 10 mines in Saline County. I say that the track in question here can be operated with reasonable practicability and safety in the handling of coal cars, loaded and empty, from the Dering Coal Company Mine No. 2 to the connection of the Big Four. I am not a track expert, but I have seen mine tracks for 6 or 7 years. I have not seen any better than this, and my instructions to the experts who were to build this track—when we were negotiating a contract for that purpose—were to build the best they knew how for the purpose for which it is intended. The layout compares very favorably with reference to other layouts in southern Illinois that I know of—with reference to operation.

This track was actually constructed on contract by the Illinois Central. We made a contract with the Illinois Central to construct this track on a cost-plus basis. (Tes. 49-51.)

[fol. 246] I have a statement showing the actual payments to the Illinois Central of the cost of this track. This exhibit was made by our accounting department, and is of expenditures actually made to date. I would not say there is no mistake in it, but it is approximately true. For example, I notice payments of $50,000 to the Illinois Central on account. I know that is correct. Each of the other items is relatively small except the purchase of the real estate for right of way, and I know those items to be correct. The statement was made under my supervision and direction. It was taken from the books of our company.

Director Bartel: It will be received subject to the objection made.

(The papers referred to were received in evidence as Complainant's Exhibit No. 7.)

The approximate cost of this track, including the right of way, to the Dering Coal Company will exceed $100,000.

Referring to the last photograph in Exhibit No. 6, this is a car standing at the lower end of the switch track at the point nearest the right of way of the Big Four Railroad. We have the manifest there. My recollection is that the date is the date shown on the photograph itself, February 9.

Mr. Cardy: It is my position that one of the prerequisites of a switch connection is the tendering of traffic, either constructively or actually. We have tendered it constructively and actually in order that there might not be any question about it. I do not believe it is necessary to tender it such as we have here. I do not believe we have to go that far. I did it first to show what the tender was, and second, to show that we could move coal off the track. I do not think it is necessary. I do not believe even though it as tendered after the complaint it would make any material difference. It is a question of whether or not we might have a right to tender up to the date of the hearing. It is a legal proposi-[fol. 247] tion because it would be useless because they could not receive it, as a matter of fact, and it is a well recognized rule of law where a tender is useless it is unnecessary. (Tes. 51-54.)

Mr. Gillespie: If you want to be fair with the Commission and the Examiner you will go ahead and make proof by Mr. Pauley that this shipment would have been accepted if you had put it at a place where it could be taken on the road, which is only 2½ miles from the mine to the Illinois Central connection.

Director Bartel: The Illinois Central connection with the Big Four?

Mr. Gillespie: Yes. That is about 2 miles farther distant than the distance they were undertaking to deliver where they knew they could not deliver.

Mr. Pauley: In the acquisition of the right of way in question it was necessary to obtain right to cross railroad tracks—the Illinois Central and the Southern Illinois Railroad & Power Company—a traction line. We made application to the officers of the Illinois Central for permission to cross their track with a switch track to get to the Big Four. That permission was granted following which a contract

was made giving us that right. I have a copy of that contract with me.

Mr. Cardy: I offer that in evidence as complainant's Exhibit No. 8.

Mr. Gillespie: I object to this on the ground first that it was never submitted to the Illinois Commerce Commission as required by law, to be approved by the Commission, and upon the further ground that the contract, on its face, shows that it provides for an extension of the railway of the Illinois Central Railroad.

Director Bartel: The contract will speak for itself. It is merely offered as Exhibit No. 8, as having been a contract entered into between the coal company and the Illinois Central Railroad. It will be received, and of course, you can [fol. 248] examine on the contents of the exhibit.

(The contract referred to was received in evidence as Complainant's Exhibit No. 8.) (Tes. 54-56.)

We entered into a contract with reference to the crossing of the traction line or the Southern Illinois Railroad & Power Company.

Mr. Cardy: I offer this in evidence as Exhibit No. 9.

Director Bartel: It will be received under the same conditions as the previous one.

(The contract referred to was received in evidence as Complainant's Exhibit No. 9.)

Mr. Gillespie: Our objection will apply to that also.

Director Bartel: The record will so show.

Mr. Pauley: We made application to the Illinois Central for the right to cross their line and that right was granted to us. We made the same sort of an application to the officials of the traction line and the right was granted to us, and the terms and conditions under which that right was granted are shown in the contract. Should we not get a connection to the Big Four Railroad, we would find ourselves with this large mine on the branch line of the Illinois Central Railroad which we knew when we bought the property could not serve us satisfactorily, and which fact has since been demonstrated. Our ultimate requirement for this mine would be from 75 to 80 cars. This branch of the Illinois Central, owing to curves, grades and conditions of

that sort, cannot pull to exceed 25 loads in a train. That would require removal from the mine to the assembly yard at Duquoin, 50 miles away, at least 3 times a day. The maximum amount of coal we have gotten out of that mine so far is between 27 and 28 hundred tons per day up to this time. Between 50 and 60 cars, approximately. I said we could get out from 70 to 80 cars. That would not require further extension of our mining operations. We would have to build up our labor supply to meet that. We have [fol. 249] the development, the coal, the equipment for doing it. We have everything except the labor. The labor would have to be built up to that point. It has been proven that the Illinois Central could not furnish us with additional cars if we so desired in order to bring us up to a greater capacity than at the present time—at least they did not during period of car shortage. (Tes. 56-61.)

We are speaking, as I understand in this petition, about conditions which exist in periods of car shortage, which are always accompanied by a bad transportation condition. This connection would naturally be used at all times, and if we were located on both lines and co-operating with them we would naturally divide the business equally between them except in the event of some unusual circumstances, and with that connection would reach markets not available to us at the present time as a practical matter. Exhibit No. 10 shows the main lines of the Illinois Central, the C. & E. I. and the Big Four. It shows the branch line of the Illinois Central which reaches Eldorado, and the mine in question. Our mine is located on the branch of the Illinois Central extending from Eldorado to Duquoin. Eldorado is 50 miles from the assembling yard of the Illinois Central and the point of connection of this proposed switch line is approximately from 6 to 7 miles from the assembling yard of the Big Four. As to the nature of the railroad extending from Duquoin to Eldorado: It is a branch line of the Illinois Central. Further than that I do not know. It ends at Eldorado.

I have no technical information as to the physical characteristics of the railroad between Eldorado and Duquoin—as to the construction. As to accomplishment, so far as our mine is concerned, I know what they can do. I have been over that line. I cannot tell you when.

One of the most troublesome difficulties we have encountered heretofore in times of car shortage particularly was in their failure to deliver cars; that is the placing of emp- [fol. 250] ties. When the mine is to operate we blow for work the night before, and then again at 5 o'clock in the morning. If we are informed we will have cars the night before, we indicate to the men it is the intention to work the mine the next day. At 5 o'clock if those cars are in sight we again blow for work. The men come to the mine. There are times frequently when we have sufficient cars to start. The Illinois Central believe they will be able to make further deliveries in time to keep the mine running. Then through some operating conditions with which I am not familiar, they fail to deliver those cars. As a practical fact, I know that to be true. It has occurred many times. (Tes. 61-65.)

Mr. Gillespie: I object to the statement by this witness that it is due to practical operating conditions when he states he don't know what the condition is, and therefore he could not know it was due to a practical operating condition.

Director Bartel: The record will so show.

Mr. Pauley: I know there is a difference in conditions in serving a mine adjacent to the main line and adjacent to the assembly yard and serving a mine 50 miles from there. I know from operating mines near assembling yards that we have very much less trouble in getting our empties delivered to us and our loads pulled than though we were at a great distance. In other words, I should say that the transportation problems increase in direct ratio to the distance. I do not know that a railroad will serve mines adjacent to an assembling yard in preference to a mine which is served at a distance from the assembling yard, but I do contend a mine located at some distance from the assembling yard gets less service by reason of the fact that there are more opportunities for failure of service in a long distance than in a short distance.

"Q. Do you know whether it is a practice of the Illinois Central during periods of car shortage to accord all mines on its system within a given district the same percentage [fol. 251] of car distribution?

"A. I do not contend it is a question of car distribution, but we contend in this 50 miles they have just that many more miles to contend with in getting their empty cars over to us on time. It has made us many times suspend work after the men had gone down into the mine.

"Q. In doing that have you secured a less percentage of cars than mines near the assembling yard?

"A. No, but we have had interruptions in the work which has made us lose some of our best men in the organization.

"Q. If you have received the same percentage as mines adjacent to the assembling yards, haven't the mines adjacent to the assembling yards had the same difficulty that you have had?

"A. No, not to the same extent."

Even though they got the same number of cars we did, they would not have the same difficulty we had because they would get their cars more promptly and their people could work. Those cars get in there—they can move from the assembling yards to mines close by in 10, 20 or 30 minutes, or a half-hour or an hour, whereas, going 50 miles it would be, you know, better than 2 or 3 hours away, and they are subject to engine failures and a good many things, and we do not get them there promptly and, as a practical matter, when the hoisting stops the miners come out and go home. That wouldn't equalize itself over a long period of time, for the reason, as I have said, the better class of men will not work in a mine subject to interruptions of this kind. When they go down into the mine they want to work. If our mine gets the same percentage of car distribution as a mine adjacent to Duquoin, we will say, we would get the same number of cars pro rata according to our mine rating. They have not the same difficulties we do with mine labor and everything else because the mine nearer the yard will get its cars at 8 o'clock, as promised. Our cars are promised to us at 8 o'clock, and in the course of traveling [fol. 252] 50 miles to get them there they encounter interruptions making them late, and they do not give us the service. It is not a question of the number of cars. We have had interrupted service to the extent that it has had a very material bearing on our labor supply. The Illinois Central can handle 25 loads on its branch line. I do not

know how many empties. It is a single line. Twenty-five loads per train. I do not know how many trains they operate; there is a variation in that. There is other traffic besides coal traffic. They have one switch engine at Eldorado. The assembling yard of the Illinois Central is at Duquoin. The Illinois Central has a connection with the Big Four at Eldorado. If we desire to ship to a point on the Big Four, so far as the route is concerned, it can be used. (Tes. 65-70.)

I have had charge of the operation of 10 Ogara mines, and one mine of our own. At the same time, 11 mines in Saline County on the main line of the Big Four. Those mines are adjacent to the main line. I am comparing the service accorded those mines adjacent to the main line with the service accorded our mine on the branch of the Illinois Central. The service accorded shippers along the main line of the Big Four is very much better than the service accorded shippers located along the branch line of the Illinois Central. I have not had any experience as to how the shippers on the main line of the Illinois Central are treated, adjacent to the main line of the Illinois Central. (Tes. 71-72.)

I know the service as a practical matter is very much better the nearer you get to an assembling yard. At least, on the mines with which I am familiar that is the fact. I take it for granted it is operating conditions that bring it about. In times of car shortage and bad transportation conditions, you get interruption of operation that I have described here. You get the result I have already mentioned, that your best men leave you for that reason. At the same time from a commercial standpoint under conditions of car shortage and a short supply is when you are [fol. 253] building up your trade and getting your customers and cementing them to you. In times like that it is impossible with this interrupted service to get the men to produce your coal. You get the cars and you do not get the service. You cannot get your men in. They are working in mines where the service is better and the operation is more regular. You are then short on your production and cannot take care of customers you have as in the case of mines getting better service. The result is that your customers leave you and when you then come to a condi-

tion of full car supply you have lost your customers to the man who has taken care of them when it was hard to get coal. He also had customers to take care of, and he could take care of them because he had a more steady operation and could get the capacity of his mine. If he were on the same road, he did not have any greater percentage of car supply than we did. And in our case we are on but one road. Here is a mine on a branch line of the Illinois Central and also there is some mine which is adjacent to Duquoin yards. Assuming these mines up here over a period of, we will say 30 days, have a 50% car supply and our mine has a 50% car supply here, when those mines start to work, the chances are they will get their cars and go to work. They have to bring our cars 50 miles farther than they have to bring those cars, and while they are doing that there is some delay that keeps the cars from getting there at the time they promised and expected to deliver them to us, and we get a condition where the men have gone down in the mine and loaded the cars that we have. The next supply of cars that we expect to get at 8 o'clock is late, and they get there late, and the men have gone home. We will have the cars the next morning to start with, but many of the best men that had gone to work had gone out there 2½ miles to work, and had to go back home again, many of them walking back, and they would not come again the next morning. They would quit that job because that is in a time when work is plentiful, and they would go to [fol. 254] the mine which did not have that interrupted service.

"Q. Suppose this mine near Duquoin with an 80% car supply had its cars placed in the morning in time to go to work, that 80% car supply would not enable that mine to work all day. Suppose they worked half a day, wouldn't the miners have the same difficulty as you have outlined that you have?

"A. That does not occur so often as it does in the case of a mine 50 miles away.

"Q. It would if the Illinois Central would distribute cars according to the car service rules every day.

"A. That is the number of cars. I do not contend the number of cars eventually say in a 30-day period, will not

be the same to all mines located on the Illinois Central; they will get the same percentage of their rating. If you get a less percentage rating in a 30-day period of time, materially less percentage, you have grounds for suit against the Illinois Central." (Tes. 74-78.)

Mr. Connell: It is understood this is not a case involving car supply. That is not involved at all, is it?

Mr. Cardy: Under Section 1 if we have a connection you are legally bound to furnish us cars.

Director Bartel: Isn't the real purpose of this case to secure joint service?

Mr. Cardy: Yes, I think so. There is no question about it, it is to get the joint service. We might as well have no service as being on the Illinois Central. We need the joint service. We need the transportation facilities of the Big Four. If we get it it will be a joint mine. We will expect the Big Four to supply empty cars to the mine and take the cars from the mine. (Tes. 81-82.)

[fol. 255] Referring to Exhibit No. 11, a map of Illinois, Indiana, Michigan, and other states. This map sets forth in red the Big Four lines, and in yellow the Illinois Central lines. The purpose of the map is to show the considerable territory to which we believe we should have access by reason of the Big Four connection, and which is now denied us, as a practical matter. I say as a practical matter for the reason that while it would be possible, broadly speaking, to reach any town that has a railroad from any other town that has a railroad, regardless of rates if it is necessary to get thereby a circuitous route, as a practical matter you cannot get the business out of that territory you could if you had a direct connection and a one-line haul. To some of this territory shown to the east, the route through Eldorado is a circuitous one. You will notice by this map from Eldorado the Illinois Central, in general, lies to the west of the state line between Illinois and Indiana, whereas the Big Four lines lie to the east of the state line between Illinois and Indiana. If we had a direct connection with the Big Four the movement of traffic to a great many stations in Indiana and Michigan would be a one-line haul. The market of this particular mine today is up through Illinois to Chicago and points beyond. It has not developed

any market to any great extent in Indiana and Michigan because of the railroad facilities.

"Q. I will ask you to state what is the natural market for coal mined on the Eldorado or Harrisburg division of the Big Four? That is, taking the Ogara mines, have they a large natural market in Indiana and Michigan?

"A. Yes, they have access to territory in Indiana and Michigan."

As to whether or not I have any opinion as to the fact that we do not have a direct connection having anything to do with our inability to market coal in Indiana and Michigan: That reason has been given me by salesmen. As to my operating experience on mines on the Big Four, near [fol. 256] Eldorado, other than the Ogara mines, I was connected with the company that had a mine on the Cairo Division of the Big Four. We marketed coal in Indiana from that mine to a greater extent. In times of ample car supply, the fact that we were located on two railroads instead of one had something to do with the running time of the mine or the ability to produce and market coal. You would have access to more markets. I know that in the practical operation and sale of coal in this territory. (Tes. 83-86.)

Director Bartel: I do not quite get something that has been bothering me a little bit. You say you would have a wider market in times of full car supply. Don't you now have the same markets from the Illinois Central, jointly with the Big Four?

Mr. Pauley: No. As to rates, I would not attempt to answer. I am not a rate man and I know nothing about rates, but regardless of whether or not you have rates, as a practical matter, I know you cannot sell coal by a joint rate and a two-line haul that you can sell when you have a direct connection from your mine to an industry located on the same line as your mine. That would be a factor entering into the sale of coal, among other things, if there were nothing else, which there is, for example, shipping from our mine to an industry located on the Big Four, a customer located on the Big Four, we could not sell that customer coal we had to ship out of our mine via the Illinois Central up to a certain connection with the Big Four and

then over by the Big Four. That customer would give preference to the one-line haul, and would give preference to the Big Four Railroad. The Big Four's freight solicitors, working in conjunction with the mine operation located on the Big Four, would help the mine operator located on the Big Four sell the coal, and very properly. I do not criticize that. It is my experience that a coal consumer undertakes to determine how many lines the coal is going to move over before he will purchase it; not in all cases, but to a very large extent. All things else being equal which, in the freight rate, as you illustrate it would [fol. 257] be, he would give preference to the one-line haul. I know that, not being located on the Big Four, it has something to do with our ability to sell coal to local markets on the Big Four.

(The map referred to was received in evidence as Complainant's Exhibit No. 10) (Tes. 86-88.)

Assuming we have a connection with the Big Four, with the switch track in question, as to the approximate amount of tonnage that would be delivered to the Big Four for transportation from this mine and over this connection, I can only say that if we were located jointly on the Illinois Central and the Big Four it would be very natural for us to divide the tonnage approximately equal between the two railroads. What part of it might go to intrastate and what part to interstate I could not say with any degree of accuracy. At the present time we are getting out more than 50 cars per day. If the mine were at its capacity we would be getting more than 70 cars a day. At the present time, as I say, the inclination would be to divide the business equally, if there were no governing factors. We would then give the Big Four 25 cars per day, which would be 1,250 tons. I can state that there would be a substantial amount of tonnage delivered to the Big Four for shipments via its line to interstate points daily after this connection is provided. Based upon my knowledge of the markets and general conditions, that amount of tonnage should not be less than 20 cars. It would move to interstate destinations, largely. I would say if we were going to take interstate and intrastate we would be giving them more than 20 cars per day. A portion of that would move to Chicago. The

freight rate from Eldorado to Chicago via the Big Four is $1.95. (Tes. 89-91.)

Mr. Milligan for the defendants testified in the state case that it would take a little over $2,000; $2,070 or $2,080 to make the switch connection—connect up with the mine track. My opinion is that the Big Four should construct, pay for [fol. 258] and maintain the switch. It cost them $2,000 to do it. We are spending $100,000 on this branch and giving them a substantial tonnage. I should think they would be willing to stand the balance. I feel they should operate and maintain the switch connection. We do not want to send men on their rails nor pay them for the work they do. I mean between their right of way and their track. In other words, they should construct the track on their right of way and the complainant should maintain and operate the track beyond on its property. (Tes. 94-96.)

To maintain and operate the track is meant that after building the track, if there are any repairs and upkeep to be put upon that track, the Big Four should do it at its expense and risk. That is the portion of the track on the right of way of the Big Four; I am talking in these recent questions to the track on the property of the Big Four Railroad. I mean by the operation of it any work that may be done upon it. That really is all in the question of upkeep. By "maintain and operate" I mean merely the upkeep of the track, located on the Big Four. We would also expect the Big Four to deliver cars over that connection to the Dering Coal Company at the connection of the mine track. So far as the operation and maintenance of the track and the handling of traffic from the connection of the Big Four to the mine in this proceeding, we are not asking the Big Four to operate, and it is the intention of the Dering Coal Company to do whatever is necessary in that respect. Between Eldorado and Harrisburg there are two tracks of the Big Four Railroad. I hear them referred to as a main track and a passing track. Generally, I would say the main track runs north and south. I have always understood that the most easterly track was the main track and the westerly track was the passing track. I do not know where this so-called passing track connects with the main track on the north. I do not know where it ends. (Tes. 97-99.)

[fol. 529] I don't recall if it connects just north of Eldorado. It is the westerly track with which we are asking a connection—what I termed the so-called passing track. There are other connections on this particular track adjacent to the proposed connection. Wasson No. 1 comes off this same track at a distance of approximately half a mile north from the point at which we ask connection. It cuts into this passing track in the same direction as the proposed connection here suggested. There are other connections or switch tracks leading into mines connected up with this so-called passing track. There are 2 mines south of this connection we ask, no great distance. I do not know how far; a couple of miles; Ogara No. 1, and Ogara No. 12. They are mine sidings. As to whether they are operated and controlled by the Big Four Railroad or are private property, I cannot positively testify to that. I have known in the past, inasmuch as we had the operation of the other mines on this line, most of them; my recollection was that most of these mine tracks were private properties of the mines. That might not be true in all cases; I am sure it was in some cases. In the handling of traffic over the proposed connection as compared with the handling of traffic over these connections I described, there would be no substantial difference that I can see.

As to whether I would say, as to the operation and delivery of and receipt of cars by the Big Four over this connection is concerned, that that would materially increase the hazard of operation of the Big Four to any extent: I assume the more switches you have from a railroad track to a siding the more danger there would be, but I do not see that it would materially increase it. The complainant had a proceeding before the State Commission seeking a connection at the exact point for the purpose of handling intrastate traffic. The State Commission issued orders authorizing the connection and approving the crossings over the Illinois Central, the traction line, and over the highways, [fol. 260] over which this connection operates. (Tes. 99-102.)

(A map showing the main line of the Big Four, the Illinois Central, and the C. & E. I. in the southern Illinois coal field, showing various mines located to the main line, and

also showing the assembling yard of the Illinois Central and the Big Four Railroad, was received in evidence as Complainant's Exhibit 11.)

Mr. Cardy: I would like to submit as complainant's exhibit No. 12, copies of the orders of the Illinois Commerce Commission issued May 3, and May 8, 1923, providing for the manner in which the complainant should construct the crossing across the Illinois Central, the traction line, and three highways, and also an order requiring the defendant to make a connection between the track constructed by the complainant and the line of the defendant. These orders are printed at page 53 of the brief filed in the Circuit Court of Appeals of Saline County.

(The pamphlet mentioned was received in evidence as Complainant's Exhibit No. 12.)

Mr. Cardy: In connection with the offer of this exhibit I desire to call the Examiner's attention to the fact in the defendant's answer is printed a copy of an order of the Illinois Commerce Commission shown as Exhibit C. This order was vacated and set aside and the order shown in Exhibit 12 entered.

Mr. Gillespie: This order was granted to the Illinois Central and the last one was granted to the Dering Coal Company. (Tes. 102-104.)

Cross-examination:

The corporate name of our corporation is The J. K. Dering Coal Company. That corporation is a business corporation organized under the general incorporation laws of the State of Illinois. I have an extract here from our charter showing charter powers. I have not offered it in evidence. (Tes. 104-105.)

[fol. 261] From this railroad connection with the Illinois Central at our mine along the line of the Illinois Central to the connection of the Illinois Central with the Big Four Railroad, it is not far from 2½ miles. I do not recall that we ever shipped any coal over that connection over the Big Four Railroad. I cannot say whether we ever actually tendered any coal via such routing or not; that is, the Eldo-

rado route. Recently the subject came up; we had some customers on the Cairo Division of the Big Four. I told our Sales Department, which was sending a salesman down that route, that we would route shipments in that manner if necessary, and would absorb any differential there might be in freight rates. I authorized them to do that. Whether they sold any coal and so routed it, I do not know. To my knowledge, we never had a shipment tendered in that way that was declined by the Big Four. I do know that this car which I said was tendered over this unfinished connection near Wasson was not accepted at that point. I think I saw a letter from the Agent at Eldorado to the effect that if we would tender that over this connection it would be accepted and transported. From our mine to this proposed connection with the Big Four, it is approximately 2½ miles. Wasson must be about a half-mile from that. I don't know that it is 3½ miles from our mine to the point where we propose to make this connection. I don't know how far it is, except in an approximate way. I would say that from the boundary line of our coal to the Big Four right of way at the nearest point is approximately half a mile. The first negotiations we had with the railroad company—at the start—before we built our mine, related to a joint switching arrangement between the Big Four and the Illinois Central. That negotiation was never consummated. The only influence that negotiation had upon us with respect to the location of our mine tipple was that we located our mine tipple adjacent to and on the north side or northeast side of the Illinois Central, whereas we would have located it on the southwest side.

[fol. 262] I had not selected when we bought this tract of coal the Illinois Central as the road upon which we would locate out tipple. We did not at that time acquire any coal land that extended up to the line of the Big Four railroad. We did not acquire any right of way to give us access to the line of the Big Four at that time. (Tes. 106-109.)

"Q. Afterwards you had further negotiations with the Big Four Railroad along in 1918, in which you attempted to have them carry out what you understood was a sort of understanding in which no agreement was entered into,

that they would give you a joint arrangement—agree to a joint arrangement. Isn't that true?

"A. You ask me if I attempted to have them consummate that?"

I did, in 1919. When we ascertained they would not do that and that arrangement could not be carried out, we then filed our complaint before this Commission upon which the order dismissing the complaint was subsequently made.

The top estimate of the potential capacity of our mine I would say was 4,000 tons and the lower estimate, 3,500 tons. We have never reached a maximum and we have never reached 3,500 tons. As to whether we have ever been in a condition under which we could produce in our mine the minimum, 3,500 tons, in a single day: We could produce that today. We have not the men in our employ to do it. We have never had them so that we could do it. It is not true that when we built our mine and planned it we figured on clear coal in which there were no faults and obstructions in the mine. We figured on faults. There are faults all through the field; we know where they are. We knew where they were when we bought our coal. We figured on those faults. It is not the case that on account of the faults in our mine we could not and never could produce the maximum I say we have provided for. It is absolutely not the case. Nobody knows more about that than I do. I think I know more about it than our mining engineer. It is more important to me. (Tes. 109-113.)

[fol. 263] We own the right of way from our mine to the connection with the Big Four. We own the land and the fees. The strip is of various widths. My recollection is from 60 to 75 feet. I do not know exactly. The strip was bought wide enough to put the tracks we wanted to put in. We bought that along during the month of June, 1922, for the most part. At the time we bought this right of way we bought it all at one time, as far as I can recall. It was taken first under option and then purchased. There might have been some slight variation in taking it over, but we bought it approximately all at the same time. We bought it from the owners of the land—R. H. and Laura Bramlet; Thomas Barton, W. R. Joiner, R. H. Johnson, John N. Bramlet, Robert Moore. I am not sure that is all. We did

not get any right of way from Mr. Wasson, of the Wasson Coal Company, or from the Wasson Coal Company. We originally planned to get right of way from them. We did not negotiate with Mr. Wasson with a view to having him join in this application; never talked with him on that subject at all. I never discussed an arrangement with Mr. Wasson that he and I cooperate and build this track to establish an exchange of coal from the Wasson mine to the Illinois Central or coal from the Illinois Central to the Big Four. To my knowledge no representative of our company ever discussed that subject with Mr. Wasson at all. I do say that that was not discussed by Mr. Cardy with Mr. Wasson. Mr. Cardy asked Mr. Wasson if we could purchase from him a right of way over the corner of a lot he owned. Mr. Wasson indicated his willingness to let us have it. We then dismissed that from our minds entirely. Some time later I heard indirectly that Mr. Wasson wanted to make such an arrangement. I said that is something we cannot discuss because we have no right to discuss it. It never was brought to me and I never discussed it with Mr. Wasson. I did hear afterwards that Mr. Wasson went to the Illinois Central and tried to make that arrangement, but I do not know what the Illinois Central said. (Tes. 113-117.)

[fol. 264] I do know Mr. Wasson owns a tract of coal land up there, and that he declined finally to let us have this tract of land. I do not know the ground of his declination. I only know that he declined to sell it to us, or to give us a right of way over it. When I talked to Mr. Brister about this, he suggested the construction of a switch. So far as I know, he didn't say that that switch would have to be located within the switching district of Eldorado, if there was one built. He did not say that so far as I can recall. No contract was ever made to build any switch.

"Q. No positive agreement was ever made that the switch would be built by anybody?

"A. That was a suggestion as a solution to our difficulties."

They did not agree to it. I took it at that time that they meant to do it that way. Mr. Brister came there representing Mr. Worcester. I did not know that Mr. Brister had no authority to make any arrangement until submitted and

approved by the corporation. I learned that after they would not do it. I know it was turned down in New York by Mr. Smith, the President of the Big Four. I learned it was turned down about September 10, 1919. I did not rely on any such arrangement after that; it was turned down then. I did not know that at that time nobody had any authority from that time on unless they submitted the matter to the President of the company. I saw what happened in that case. I had reason to believe business would be transacted in a different way. We always done business with Mr. Worcester, and I would have considered at any time after that and would consider today that Mr. Worcester had full authority to carry out any agreement he made, that is, that Mr. Worcester would not make an agreement if he did not have authority. I did not understand that he had not made any agreement. I did not know he had not made any agreement because he had no power to make an agreement. (Tes. 117-121.)

[fol. 265] I did not know before that a transaction of this kind would have to go through the regular channels and be approved by the different officials of the railroad, different departments before it could become a contract or become binding, and I do not know it now, and I do not believe it. Mr. Worcester is Vice President and General Manager of the Big Four. I know Mr. Worcester was Regional Director during the war. My recollection is that I had a conference again with Mr. Worcester before Mr. Stevenson came in. I cannot give you the date of that last conference with Mr. Worcester, except that it was a short time prior to the time when Mr. Stevenson called upon us and made his proposition. It was a short time after the decision in the Dering Company mine case. The decision in the Dering mines case was June 17, 1921. Then in the latter part of October we were advised that they would be in favor of building a switch connection there if we paid for it. The negotiation therefore took place between June 17 and October, 1921. We made payments for the option we got on this right of way before we bought it. Probably small payments; I do not recall that. A man named Herman was in charge of the corps of the Big Four Railroad that made the survey, as I recall it. I can explain how it happens that there is no initial of the railway company or of the engineer who is alleged to have made

that plan upon the plan itself. This plan was made by our own engineer after he went over the ground with the Big Four engineer, Herman. The Big Four engineer did not make this plan we have submitted here. So far as that letter and that plan are concerned, it is not all from our engineer. All that we introduced in evidence is from our engineer, but I was in Eldorado during the time when this gang was on the ground. There is nothing on that plan except the signature of our engineer. Referring to Exhibit 2, there is nothing in relation to it except what our engineer says in a letter, and this plan. That is all there is to it. (Tes. 121-125.)

[fol. 266] I do not recall the date of the case before the Illinois Commission. I remember all about the case. For the most part, I remember what I testified.

"Q. If you do remember your testimony you remember you did not have the right of way. You merely had an option for a part of it.

"A. As I say, if I knew the date of the hearing I could perhaps tell you, but I think quite likely your statement is correct."

At one time we had options on two complete lines; two complete routes a quarter of a mile apart. I cannot fix the date, and I don't know whether it is the case or not that at the time this hearing occurred we were uncertain as to where we would build the track. The contract with the Illinois Central to build this track has been introduced as an exhibit. That contract was under negotiation for a long time; perhaps 2 or 3 months before it was finally signed up. As I recall it, we introduced in evidence a contract at the hearing before the Illinois Commission. I do not recall whether it was after that hearing that we proceeded to build the track. I do not think it was; I am not sure of that. It is a question of dates and I haven't the dates in my mind. I do not remember what the conditions were at that time. That is, with reference to whether we had started to build or whether we had not; whether it was a question of options or purchase of the right of way. We went on building the track. It is not my recollection that we started to build this track before we got a decision of the Commission. I knew that there was an appeal from the order of the Commission as soon as it was entered and

before it became a final order. I do not know that the order was ever suspended; I know you made an application to carry it to the court in Saline County. I do not know that it was ever suspended and I do not know that today. I do not know. I have kept in touch with this case, [fol. 267] very closely. I have kept in touch with the proceedings before the courts. I do not know that there has been any suspension order. I do not today recall having ever heard of a suspension order. Perhaps I do not know what a suspension order is. I do not want to equivocate when I say "perhaps." I do not call that equivocation when I say perhaps I do not and will not admit that I do not. I had information that the State Commission had entered an order in our favor. That is all the information I got. Mr. Cardy told me he was before the Commission when the order was finally entered and appeal perfected to the Supreme Court. I do not know what a suspension order is. (Tes. 125-131a.)

Mr. Cardy: I will make the statement for the record that on January 11, 1924, the Circuit Court of Saline County affirmed both orders of the Commission. In affirming the order of the Commission it issued a so-called suspension order the first day of the April Term of the Supreme Court of Illinois, that being the first day to make an application for further suspension order, provided the defendant filed a bond in the sum of, I think, $10,000, pending appeal. The orders of the Commission are now pending on appeal before the Supreme Court of Illinois. (Tes. 131a.)

Mr. Pauley: It is true that after October 3 and after January 11, we went right on building this track and completed it with those orders pending. We formerly owned a mine on the Big Four Railroad and shipped a little coal over that to some point in Indiana. We shipped some coal to Lafayette, Ind., as I recall, and some to Indianapolis. We shipped some coal into Michigan through Indiana. We owned that mine from about May 1, 1917, to January 2, 1921. I don't know how much coal we shipped to Indiana during the time we owned that mine. I have no means here of ascertaining it. The records are in my possession by which I could have ascertained it, but I haven't any information here on the subject. As to how much coal we shipped over the Big Four to any other point than Indiana

[fol. 268] while we owned that mine: we shipped the major part of the coal from that mine to Chicago. As to whether it went to Chicago over the Big Four: I have understood from the evidence given from time to time in this case that there is a break in the Big Four Railroad; it runs only to Danville. I know that as a matter of common knowledge. In a general way, I am acquainted with the coal fields of Indiana. There is coal found in the western part of Indiana, all the way from approximately Clinton clear down to the south of the State; down around Evansville. That strip is not so very broad; that runs, let us say, 20 miles; that is approximate. I think the Big Four lines enter Indiana across that field in the neighborhood of Terre Haute. They have a line from Indianapolis to Chicago, which would not, of course, be available for us to ship over in any event except if it came from another branch of the Big Four onto that. I cannot say it would have to come from Chicago if we shipped into Indiana over that line. It could not enter to any shipping point in Indiana over the line from Eldorado; it would have to go off the Cairo Division to get into Indiana, and it would have to leave that division to get into Indiana and on a Big Four line at Paris or just east of Paris, between Paris and Terre Haute. (Tes. 131a-134.)

I do not know that south of Terre Haute the Baltimore & Ohio crosses into Indiana. I do not know that its main line crosses at Vincennes. I don't know it does and that that road crosses 3 or 4 branches of the Illinois Central. I do not know that it crosses the main line in the neighborhood of Centralia, south of Centralia, between that and Duquoin, and crosses the St. Louis Division over toward St. Louis. I do not know where the Vandalia crosses the Illinois Central. I don't know it crosses at Vandalia, one branch line, the main line; crosses the main line of the Vandalia.

I would say it is true that there is not any coal territory in Indiana that we cannot reach with a two-line haul. In [fol. 269] general, you can reach any town that has a railroad from any other town that has a railroad if you go far enough.

"Q. Isn't it true that if you ship over the Big Four, the Cairo Branch, on which Eldorado is located, you would have

to ship to Paris and there make a connection into Indiana and make a 2-line haul, practically over the main line?

"A. But both lines are Big Four.

"Q. Both lines are Big Four, but it is two separate lines, and they are operating separately, aren't they?

"A. I am not familiar with the operation. To me a line of the Big Four is a line of the Big Four."

I know there are no trains running from Eldorado on the Big Four to Terre Haute. I know that we can ship from Eldorado to Indianapolis on the Illinois Central. You could go all the way in one case by the Illinois Central, and all the way by the Big Four in the other case. That is the difference, and you would reach practically the same point, Indianapolis. We do not ship any coal into Missouri or into Texas, but we do ship into Iowa. I do not know what lines our coal goes on into Iowa. I do not know how much coal we have shipped into Indiana from our mine at Eldorado at any time. I know that there is some coal that goes from the Saline County district into Indiana. I know something about the volume of the coal going out of that territory into Indiana. I estimate it at 4 or 5 per cent. When I say 4 or 5 per cent, I mean outside of Chicago. I mean into Indiana. A great deal of that coal goes beyond Chicago to the Northwest. There is a good deal of coal that goes from Saline County into Iowa. From memory, I could not say what per cent. It sounds high to say that 90% of all the coal mined in that territory goes to Chicago. I might have testified as to that figure in the Illinois hearing after looking it up. If so, it was then an estimate just as I am doing now. (Tes. 134-140.)

[fol. 270] There has been a considerable tonnage of coal shipped into Michigan at times, and coal should go into Michigan from this territory at all times. The times I was thinking of, perhaps there was an unusual tonnage because of hard conditions when all coal was going out of this territory. It is true that there is a very large volume of coal produced at points very much nearer and more accessible to Michigan than coal produced in Saline County, but that does not keep coal of this quality from crossing that territory into another territory. It is possibly true that the coal out of West Virginia and Pennsylvania can reach Michigan about as easily as the coal from southern Illinois, but

there is no point in that in connection with what I am talking about. It is true that the coal in Indiana would reach it at a much shorter distance from the mines, but you have got to talk about quality when you talk about that. So far as these comparative coals are concerned, the West Virginia coal crosses Indiana and Illinois into Ohio because of its quality. The West Virginia coal that would go into Michigan would be more for domestic purposes. The Southern Illinois coal, in my judgment, is the strongest steam coal mined in Indiana and Illinois. And if you have a boiler plant which is pushed to its capacity you have got to have the best coal you can buy for it, no difference where it comes from or whether you can get coal closer at home. I know something about the comparative heat units in these different fields. I know that the Illinois coal has not got any more heat units in it than the West Virginia and the Pennsylvania coal, but the West Virginia coal is used mostly for domestic purposes. And heat units for domestic use are not the last argument. It is smokeless coal; it is more desirable for domestic use, and it is higher priced, and used for domestic purposes.

As to what big institutions we have ever sold a carload of coal to in Michigan: I recall we have shipped coal to Kalamazoo. I do not recall the name of our customers. [fol. 271] We have shipped coal into Jackson. As I recall it, it was steam coal that we shipped to those places. We have shipped coal to Iowa. I notice here Clinton. That was from our Illinois mine. I cannot recall at the moment that we shipped anything from Indiana there. (Tes. 141-143.)

It is true that when this case was tried before the Illinois Commission our contention was that the markets we wanted to reach were the local markets on the Big Four Railroad that were purely local and not reached by the Illinois Central or some connecting line of the Illinois Central. It is true that was our contention in the State case. We were talking about the State of Illinois at that time. In that case, perhaps that was all the complaint we were making so far as markets were concerned at that time. This is a different case. In that hearing we were talking only about the State of Illinois. That is what I say now. Then, I might have gone out of the State of Illinois. If so, it had no bearing

upon the case. We did introduce exhibits in that case. I remember that we made an application for a through joint rate before the Illinois Commission over the Illinois Central to Eldorado, over the Big Four to Parkee City, over the Illinois Central from that point to Roseyview. I remember that. We got that rate. I cannot tell you that after we got that rate we compromised the matter with the Illinois Central and from it took a good deal higher rates than the Commission had authorized. There was some discussion about that but I do not recall what was done about that rate. I know we got a rate of $1.05. I recall that very distinctly. I know that there was a distinction about some other rate. What was done in that compromise I am unable to say. I have forgotten it if I ever knew. I do not know now what our rate is to Roseyview. (Tes. 144-146.)

{fol. 272} When we operated our Ogara mines I cannot recall that we shipped coal into Michigan. It has been 1919 since we operated those mines. We may differ on what is a considerable quantity, but we ship coal to Indiana. I do not know how much. If we had connections by way of the Big Four and by way of the Illinois Central, we would have open to us all the markets located on the Big Four and on the Illinois Central, whereas at the present time we only have the markets that are located on the Illinois Central. Any other market, in spite of the fact we can reach it at the same freight rate, is not so accessible to us, as a practical matter, because you cannot sell coal as you can when you are shipping it all by the Big Four, and I do not care if it is two or three or four branches of the Big Four. We had two other railroads accessible to us besides the Big Four when we were operating the Ogara mines. They were the Illinois Central and the Louisville & Nashville. There are 3 Ogara mines at Eldorado. At that time, we had more for the Ogara mine than we are asking for the Dering now. I cannot tell you how much we shipped to Chicago and Illinois. I can only say that Chicago being the largest market, particularly when you include points beyond Chicago, that you have got the great bulk of the tonnage to Chicago. We do not ship coal to St. Louis currently. I think we have shipped some coal to East St. Louis. We didn't ship coal to St. Louis because there are coal fields much closer to St. Louis that produce a quality of coal that they can use, for the most part. There is other coal

going in there. Commencing at Saline County and going north on the Big Four Railroad, the first mines we strike either on the Big Four or just off the Big Four in Indiana, are mines around Vincennes and Terre Haute; around Clinton. Those mines lie east of the Cairo Division of the Big Four; no great distance; 10, 15 or 20 miles; probably more. Danville is next; there is considerable coal at Danville; it is getting pretty well worked out. At Danville the Big Four stops. (Tes. 148-151.)

[fol. 273] Our freight rate on the Big Four to Chicago from our mine and from the Harrisburg-Eldorado district, and all other mines, is the same as it is on the Big Four. That is, we have a group rate from that territory to Chicago, and all ship at the same rate.

"Q. Isn't it true, Mr. Pauley, that after this mine and after this track is connected if you succeed in getting a connection, you intend to try to compel the Big Four Railroad to operate it?

"A. The first question that I wish to ask of our attorneys when the connection is made is whether the Big Four is obligated to operate it. If they say not, that finishes it. If they say they are, I shall attempt to make them do it."

As to whether it is not true that I have asked our attorneys and they have advised me whenever the connection is made, if it is made, that track becomes a public track and we can compel them to operate it: I do not know that I have specifically answered that question. That seems clear in my mind because I went to a man within a week that I heard had some locomotives for sale and got a price on them, having in mind we might have to operate them ourselves and charge you for it. We might have to operate them ourselves and charge you for it. We are not going into the railroad business. We are not going to operate a switch engine unless we have to. I say I thought we might have to operate them and charge them for it. I do not know whether we will have to operate them or not. If we operate them I do not know whether we can charge for it, but if we have to operate it I hope we can charge the Big Four for it and I have been asked that question and I do not know. That is, for the operation of this spur track of ours. I do not mean we expect an allowance or anything of the kind. I mean what I say. (Tes. 151-153.)

[fol. 274] I do not recall saying we did not have satisfactory freight rates. I do not know if we have satisfactory freight rates. I do not know anything about that. It is true that if we had a reciprocal switching arrangement with the Big Four between the Big Four and the Illinois Central from the connection at Eldorado, to our mine, we would have all that we are contending for in the construction of this track. We would have everything we contend for, physically. Economically we haven't got everything we want now. We want the service of the Big Four Railroad, as demonstrated by the fact that we are paying $100,000 to get it, which is a lot of money for a coal company, and we are not kidding ourselves or you. We would not spend $100,000 for something we did not need. I think we need it or we would not do it. When we made our contract with the Illinois Central, we did not provide for the Illinois Central to operate this track. The contract with the Illinois Central speaks for itself. When we made our contract with the Illinois Central we did not give the Illinois Central control of this track. When we made that contract, I understood just this: That we would forego no rights; that we would make no contract that would in any manner hamper the operation of this track for our use. That was the big point in my mind, and that is what I guarded against. In addition to that, I was not willing, if I got that, to concede anything else these two railroads wanted. I do not know that the contract provides for running spurs off of it into the coal territory adjacent, and for the operation of those spurs by the Illinois Central. I read those contracts, and signed them. I know that the Illinois Central specifically has the right to enter the Wasson mine over that track. You have asked me a question that indicates they can run all over that part of the country over that track. There is no such provision in the contract. The contract is in evidence and you will not be able to prove it by the contract. (Tes. 153-156.)

[fol. 275] "Q. Isn't it true, Mr. Pauley, you entered into an arrangement with the Illinois Central by one contract, and with the Southern Illinois Railway & Power Company in another contract and you made a joint application to the Illinois Commission upon which there was one hearing, and an order was entered by the Illinois Commission grant-

ing the absolute right to build, maintain and operate this track by the Illinois Central?

"A. We made such an application as that to the Illinois Commission."

We received permission granting us the rights included in that operation. Whether there was a hearing I do not know. I do not know enough about the details of the order to know if it was entirely a grant to the Illinois Central Railroad. I never read the order; I doubt if I ever did read it.

I said that it showed bad judgment to locate a mine of ours so it can be served by only one railroad It is bad judgment—to locate a mine of ours on one railroad. The two mines I referred to that are about the same capacity as ours are the Saline County Coal Company Mine No. 3, and the Harrisburg Colliery Company's mine. One is served at Harrisburg on the Big Four—locally to the Big Four alone—served only by the Big Four. The other mine is located at Harco, a distance of some 10 miles from Harrisburg, on the Big Four. It is reached by a branch of the Big Four, or switch track. It is located locally on a branch of the Big Four about 10 miles from Harrisburg. I would not say the gentlemen who located those two mines showed bad judgment in locating them where they did, because those men could not sink mines in that locality very well and have them on two lines of railroad. We didn't sink our mine between the Illinois Central and the Big Four because the lay of the land, the slope of the surface would lend itself better to the building of mine sidings, give us the natural grades we wanted in the location in which we placed the mine, and we had the agreement of two reputable railroads to give us joint service. There- [fol. 276] fore we thought it made no difference. I refer to Mr. Worcester's agreement to make a reciprocal arrangement with the Illinois Central which would give us the service of both roads. I have nothing to show that there was such an agreement other than the letters I have offered here. To the best of my knowledge there is no other line closer to these other two mines—the Harrisburg Colliery mine and the Saline County Coal mine No. 3—than the branch line of the Illinois Central upon which our mine is located. I cannot tell you across-country how far it is

from the property of the Harrisburg Colliery Company to that branch line of the Illinois Central, but I would guess it to be more than a couple of miles. I think there would be no practical way of reaching the Illinois Central branch line from Saline No. 3, than by the line of the Big Four, which is about 10 miles. Now, across-country to the nearest point of the Illinois Central might be slightly less. By way of the Big Four Railroad, it is 10 miles from Saline County mine No. 3 to the Illinois Central branch line, over to Eldorado. Across-country where they might build a track, it must be 7 or 8 miles. I cannot tell from the map just how far it is. I have no map here to scale that would tell me that. (Tes. 156-160.)

I got the information that the Illinois Central could not handle more than 25 cars over the Eldorado branch from the Illinois Central people, and we know as a practical matter that is what they pull, approximately. I cannot tell you the reason for that. We have complained to the Illinois Central about our service at the mine; we have complained all the way from Carbondale, their division headquarters, to Chicago; going from their car distributor and train dispatcher all the way to Mr. Markham, the president of the road. We complained about their service—largely the service in handling empties. It did not make so much difference to us about the handling of the loads; as long as they kept the loaded tracks below the mine sufficiently [fol. 277] clear to enable us to drop cars down from the tipple. We are chiefly interested in getting the empties loaded and getting them out of the way of the mine and not so much interested how the loads are handled after they get out of our sight. It makes a vast difference in the length of time it takes to get coal from the mine to the point of consumption, because many times, depending upon market conditions the consumers do not carry any large stocks ahead, and as a matter of operation in consuming coal it is very much more economic to take it from the cars directly to the boiler room and not pass it through a storage pile. Therefore, prompt movement from the mine to the point of consumption is an important factor. You could not figure regular arrivals without having prompt movement. If it took all the coal we will say 10 days to go from the mine to Chicago, after the man got started right, he

would get along all right, except there is more opportunity for delays in a 10-day transit than there is in a 5-day transit. The delay will not be about uniform, in comparing one day with another in handling the coal from our mine to Chicago. This coal shipped to Chicago is consigned to ourselves at Chicago very, very seldom. It is usually consigned to the customer. The customers are manufacturers and coal dealers, both. When I say "coal dealers" I consider the dealer the consumer. He does not burn the coal, but from our standpoint the coal dealer is the same to us as the steam plant and gets the coal and actually uses it. The coal dealers sell it. We can divide our Chicago tonnage between the industrial coal and domestic coal, but I could only guess at that division. There have been times in the last two years when there have been mines on the Big Four operated to their maximum capacity; not continuously for two years. For example, the Harco mine we spoke of, was operated to its full capacity all during the month of January past—this year. I cannot say if that was railroad fuel as that is another man's [fol. 278] mine, but I do not believe there was much, if any, railroad fuel in it. I heard of no specific car shortage in January of this year. I know of no mine on the Big Four during the period of car shortage that was operated to its maximum capacity. If I referred to adverse weather conditions along the Eldorado branch of the Illinois Central, it was only incidental, but by adverse weather conditions I would mean sleet and snow and rain and such weather conditions that would prevent your locomotives from steaming properly. I don't know how many days during the present winter there was snow along this Eldorado branch. I know it snows down there, but I don't know how often. I do not know how many days during the months of November and December of last year and January of this year the thermometer was below freezing. I know there are days every winter when the movement of traffic is hampered by such conditions as I have described—any branch from the point you speak of on north. I am speaking of this branch from Eldorado to Duquoin. I don't know how many days the weather interfered with the operation of trains on that branch. I should say that mines located on the Big Four in selling to consumers located on the Illinois Central are in the same position that

we are in with respect to consumers on the Big Four. Generally speaking, they have a two-line haul that way the same as we have. If I understand your question, that is not true generally with respect to all of these coal-carrying roads originating coal.

As to the governing factors I mentioned when I said the amount of coal we would give to the Big Four providing a connection was made would be divided about equally: The difference in the car supply is an example. I had no specific governing factors in mind. The question of car supply occurs to me. If we could not get cars off the Big Four and we could from the Illinois Central we would naturally ship more tonnage via the Illinois Central. Another governing factor would be customers who would specify some other delivery. No difference whether we paid the freight [fol. 279] rate or whether we did not, we observe our customers' preference as to the routing. I have no governing factors specifically in mind. I simply say the natural thing for us to do would be to divide it equally. Taking our Chicago business, for example, it is possible the customer would demand that traffic move direct over the Illinois Central. And it is possible they would demand it move direct over the Big Four. For the most part we would be in a position to control that movement of the traffic even if the connection is made. As to how it would move directly on the Big Four to Chicago: It would be turned over to the Big Four to be taken to Chicago without any routing specification from us. I assume they have connections with other roads getting them into Chicago. I do not know. As far as I know, I think it would be a practical proposition as compared with the direct route of the Illinois Central to Chicago.

"Q. I thought you testified this morning your customers desired wherever possible and that your orders were affected frequently by the fact that the customer desired a one line haul as compared with a two line haul. If that was the case with your Chicago customers, the Chicago business would naturally move Illinois Central, wouldn't it, one line haul? That is correct, isn't it?

"A. If they so desired it, it would.

"Q. If they desire one line haul in preference to a two-line haul, the Big Four could not expect any of that traffic?

"A. No, but that would not apply to a city like Chicago, in my opinion, like it would apply to a smaller town. However, the answer to your question is 'yes.'" (Tes. 160-169.)

[fol. 280] F. B. Oren was thereupon called as a witness and, having been first duly sworn, testified as follows:

Direct examination:

My full name is F. B. Oren. I am an engineer by profession—in private practice, located at Effingham, Ill., where I have been located in engineering practice since 1919. Prior to that time, I had been an employee of the Illinois Central Railroad, from 1898 to 1919, in the capacity of engineer, on construction, maintenance, and in different operating official positions, on approximately 7 or 8 divisions of that system. My duties were, at the beginning, as chainman, rodman, resident engineer, and in charge of construction work; and, in maintenance, as track supervisor, division engineer, division roadmaster, trainmaster, and superintendent. While on the St. Louis Division, the Springfield Division, the Kentucky Division and the Indiana Division I had charge of the installation, construction and maintenance of the mine tracks on the Illinois Central in the State of Illinois prior to severing my connection with that road. I could not answer how many mines the Illinois Central served—about how many tracks were operated by the Illinois Central, over which I had charge of the maintenance, construction and operation—there were so many. In a general way, at the time I was on the St. Louis Division we were serving approximately 85 coal mines on that division. On February 9, 1924, I was called up on the 'phone, in my office at Effingham, by Mr. Pauley, at Chicago, and was asked if I had time to make an examination of a track in the vicinity of Eldorado, Ill., and if I had time to state before the Interstate Commerce Commission the condition of the track to be investigated. I advised him that I could do this for him. On February 11th of this year I went to a point about 2½ miles this side of Eldorado and walked

over the track, which, I understand, has been constructed by them in this vicinity, which extends from a point where it crosses what is known as the Eldorado Branch of the Illi- [fol. 281] nois Central in a southerly direction and ends at about the right of way line of the Big Four, approximately between 2 and 3 miles in a southerly direction from Eldorado. The track in question connects into what I understand is the track of the Dering Coal Company, some 200 feet in a northerly direction from the crossing of what is known as the Eldorado District of the Illinois Central—and extends in a southerly direction, the same being constructed of what is known as relay 85-pound rail, all ties being treated, that is creosoted, or zinz chloride treatment. The track is on from 12 to 18 inches of cinders, gravel, chats or screening ballast, and is in good line and surface. The crossing tracks, at the Illinois Central and at the traction line, are of 90-pound rail. There is one timber trestle on this track in question, constructed of 6 pile creosoted bents, with 4 stringers under each rail, of 7 by 16 material, or standard construction. Outside of the crossings, the rail used is 85-pound relay rail, the line surface of this track is very good. The track in question ends at about the Big Four right of way. At the time I investigated it, the track was in shape to take care of operation. There were approximately 60 men employed, touching up small places and making the finally completed job. (Tes. 171-175.)

I was trainmaster on the Mattoon Division, and a year and a half as superintendent of the Vicksburg Division of the Illinois Central. That is from New Orleans to Vicksburg, Mississippi. It was one of my duties, while I was in charge of the engineering department of the Illinois Central, in addition to constructing and maintaining tracks, to see that they were safe for the operation of train movements. That was my primary duty in the construction and maintenance of those tracks. In my opinion, a connection can be made between this track and the track of the Big Four so that the trains can be operated over there safely and not materially increase the hazard of operation on the track of the Big Four. By "safe for operation of train movements" I mean that the track in question would be

safe to operate over with engines and cars. The track [fol. 282] would hold the engines and cars. That is all I am testifying to.

I don't know anything about operation over these Big Four tracks. I don't know how many trains go over it. I do not know in what manner it is operated with relation to the adjacent track. I know nothing about the Big Four operation.

"By Mr. Cardy:

"Q. Mr. Oren, assuming that the track with which the connection is made is a passing track which connects with the main line of the Big Four at Eldorado and runs into the assembling yard at Harrisburg, and that the track is used for the handling of coal trains back and forth, and occasionaly used for the purpose of a passing track: what would you say as to whether or not a switch of this nature and the operation and switching of cars thereover would be reasonably safe and not materially increase the hazard of operation of trains over this track, based upon your experience in the railroad business?

"Mr. Gillespie (interposing): I object to that, upon the ground that the question does not embrace the extent of operations over the track and that it is based upon a hypothetical case that Mr. Cardy knows well is not true, because he knows that that is a main track and that it is operated as a main track, with both passenger and freight trains constantly passing over it.

"The Witness: It would not." (Tes. 175-179.)

Assuming that this track is going to be used for the handling of empty and loaded cars of coal from the Dering Mine to the Big Four Railroad, there are a great many other operations in the State of Illinois that I have personal knowledge of, which are similar in a great many respects.

I stated that I was not testifying with regard to operation on the Big Four. My answer to the following question will not include the operation of trains over tracks of the Big Four. As to how this lay-out as a switch track and the purpose for which it is intended compare generally with the switch track lay-outs where similar service is per-

[fol. 283] formed: The physical condition, of course, the track being new, is a great deal better than a lot of actual track conditions in the case of tracks serving coal mines. The operating conditions are no worse than a great many others in coal field territory,—where trains are operated over them daily with reasonable safety. There is what you call a passing track, or it could be classified as a run-around track, adjacent to where the proposed connection would be to the Big Four. I personally do not know just why this track was put in—whether for the storing of loads and empties or for running around cars being handled along this track. It could be, and no doubt would be, used for the purpose. To answer the question whether the connection and lay-out as shown on the plat would add more to its safety than if the connection was made direct with the Big Four, without paralleling it for some distance, would bring in some Big Four operating conditions, as to which I could not answer. For example, if the engines serving the mines were permitted to leave their cars on what you have classed as a passing track, and it was not used for main-line movement—I am referring to the passing track on the Big Four. If the Big Four operating plan in this vicinity was such that you would not let the engines serving the mines leave cars on the westerly track of the Big Four, loads and empties could be handled on this track in question, which would eliminate the handling of this loading in the manner I have referred to before. Let me get my answer in in a broad sense. If the Big Four superintendent or operating officer would not let engines leave his loads out on the westerly track of the Big Four, then this track built by the Dering Coal Company would be an advantage to the operating officer as a run-around track in getting rid of his load and empties. They would have to get to this individual passing track or run-around track. The Big Four could not place the empties in on this track and take out the loads without operating over the track; that is operating over the mine track. (Tes. 179-184.)

[fol. 284] It is my opinion that trains can be operated over the tracks of the Illinois Central and the tracks of the Traction Line with safety if the laws of Illinois are obeyed. I have in mind the law of Illinois as to crossings not protected with interlocking devices, which is that a train must

come to a full stop within 800 feet. I have known of a good many cases where evidence had been presented to the Commission of the conditions, and they had issued orders permitting what is known as a swinging gate protection, which is a swinging gate that is placed at one angle of the crossing, and when it is across one line the other is open—and vice versa—protected by red signals by day and red lights by night. It is my understanding that that is the nature of the protection which has been authorized and required by the State Commission. I believe that a device of that nature would be a sufficient protection in this instance. I have made an approximate estimate only as to the cost of making the connection between this track and the tracks of the Big Four; it would cost approximately $2,000 to make the connection in my opinion, including grading, labor and material. I have not gone into extreme detail. It has been 1919 since I was connected with the Illinois Central.

"Q. During your connection with the railroad company I will ask you to state whether or not there was any general practice in effect with reference to the division of expense between an industry and the railroad, as to which one should stand the cost of construction of tracks and connections.

"The Witness: I am, personally, not in a position to answer that question, as it is necessary to take into consideration the revenues to be derived from the track in question; and I am not qualified to answer." (Tes. 185-188.)

(A copy of the Director General's General Order No. 15 was received in evidence as Complainant's Exhibit No. 13.) (Tes. 189.)

Cross-examination:

I had not previous acquaintance with Mr. Pauley. He got in touch with me over the telephone at my office in [fol. 285] Effingham. I first met Mr. Pauley in Chicago, after making an examination of the track in question. That was the first time I had met him. I was told where to go in Eldorado to make an examination of this track by Mr. Pauley—and that they would have their engineer meet me and go over the track. I went over the track with a man

I judged was Mr. Pauley's engineer. One of them, as I remember, was Mr. Gary, and the other said he was a mining engineer. I do not know his name. I do not recall if it was Mr. Haskins or Mr. Lindsay. My examination of the track was to walk over it from one end to the other; that is all I did in the way of examining the track. I am not at all familiar with the number of train movements over the Big Four and the number of switching movements over this particular track, or the manner in which the track is operated. Those elements would all enter into, to a very small extent, the question of whether the track connection could be made without materially increasing the hazard. Technically speaking, they would enter into it to some extent. What I mean when I say "materially increase the hazard" is: For example, supposing there are 10 coal tracks leading off this individual track we are speaking about, and that one mine goes out of business. This track is put in. There would be no extra hazard. If this mine in question did not go out of business, and another track was entered, there would be only the additional hazard of a switch operating there.

I would not say that whether or not this track would materially increase the hazard would depend largely upon whether the maximum use of that track had been attained—not entirely. Assuming that that track can be used in the manner in which it is used and would be used after this connection was added and this business added to this track, I would not say that to make an additional connection that would cause an excessive use of the track would not materially increase the hazard. There is a mistake there some place. I would not say that there was any extraordinary [fol. 286] hazard by adding this track's business to the business already operated. To a certain extent an increase of business on a track always increases the hazard. (Tes. 189-193.)

After you have reached the maximum extent to which a track can be used with reasonable safety, if you add another connection to it, that connection alone will not materially increase the hazard. If you just connect it and do not do anything else, that would not increase the hazard a particle.

I did not say there would be no crossing protection required at all over these crossings. If I understand cor-

rectly, the laws of Illinois require a hearing in the case of all crossings at grade before the Commission, and testimony presented to the Commission will govern what is to be done. The State Commission is in a better position to specify what is needed at the individual crossing, after hearing testimony, than I am—not having heard the testimony given before the State Commission. I said it would be safe for operation if the law of the State of Illinois were complied with. I am not in a position to specify the exact name of your law and tell you where to find it. That law provides that at the crossings not interlocked trains must be stopped within 800 feet of the crossing. It is my idea that if that law was uniformly observed, these crossings would be safe. It is for the Commission to say if they would need the gates in that case. If everybody would stop, they would be safe—there never would be an accident. I am not in a position to answer the question that, therefore, there would not be any necessity for any crossing protection at all. (Tes. 193-195.)

The grade on this new track is known as a one and one-half per cent grade. I know that mostly from personal observation—observation on the ground, and from personal examination on the ground and examining the profile, from which I understand this track was constructed. Personally, I know nothing about it. It was some time, I would say, approximately, in the vicinity of 10 o'clock a. m. that I went to the Dering Coal Company's track. I immediately [fol. 287] started to walk over this new track. I would estimate it took me about 40 or 45 minutes to walk over the track. I went from the mine end of the track to the point where it is expected to connect with the Big Four. We then walked back to the Traction Line and caught an interurban car, I would judge somewhere around 11 o'clock, and went to Eldorado. I was only in the vicinity approximately an hour. I noticed one traction line car going south, in the distance, while I was in that vicinity, and the one going north on which I got. I couldn't say if they were very close together. Within 30 or 40 minutes. I do not know how many cars are run over that line. I did not see any trains pass over the Illinois Central while I was on that end of the track, except the train I came in on. I came in on a passenger train. That crossing is a stop, and I got off there. I do not know if it is required that all their

trains stop at that crossing. I would judge the train stopped there that day because it is a regular stop—I do not know. I don't know how many trains the Illinois Central operates over that crossing in 24 hours. I understand that there are other mine tracks in southern Illinois that cross the Traction line and the main line of some other railroad; there are several at Marion, on the C. & E. I., and the Carbondale District of the Illinois Central. That is just from recollection. They cross a traction line and also a steam line going to Herrin and they cross at grade. They don't have interlocking protection—just the regular gate protection. Without personal observation, I could not answer the question if all the steam lines and the Traction Company stop all their trains before they reach the crossing. As to whether it is necessary to stop trains where these gates I have described are in operation: My answer to that would be that it was a question of investigation before the Commission, and there might be some arrangement between the carriers and the Commission whereby the gates would be kept set against one line or the other. [fol. 288] In that case permission might be granted—this is my personal opinion now—to one line or the other to proceed, and the other line would have to handle the gate every time they made a movement across the crossing. If that arrangement was agreed upon in this particular case, I hardly think I would be qualified to answer which line would be closed, not knowing the operating conditions. I could not answer whether it would be possible at this particular crossing for the normal position of the gate to be against the electric line and the mine track left open. (198-205.)

I made a personal examination of the bridge I found on this mine track; I went under the bridge and stayed there about 5 minutes. That bridge is built on creosoted piles. I had nothing at all to do with the building of the track or the bridge. I did not see the blueprints of the bridge. From what I could see in walking over the ground, I would say that it was a standard construction. I do not know what is under the ground. (Tes. 205.)

Redirect examination:

In addition to walking over the tracks, I had the blueprints and profile with me—the profile and plans, if that is

what you mean. I had them when I walked over the track. I did not personally put a level on the grade to see if the grade corresponded to the profile. To verify all the grades and curves with a transit, you cannot properly check blueprints very well when you walk over a mile of line in 45 minutes. The blueprint and profile you now hand me, and which have been introduced in evidence, are copies of the blue print and profile I had at the time I made my examination. Based upon my railroad experience and my experience in the examination of profiles and track lay-outs and based upon my personal examination of the switch track in question, I would say the profiles submitted are approximately the way the situation is. (Tes. 206-207.)

[fol. 289] J. W. HUNTER was called as a witness and, having been first duly sworn, testified as follows:

Direct examination:

My name is J. W. Hunter. I am now engaged in the handling of building materials and coal in Danville, Ill. I have lived in Danville since 1915. I have been engaged in this business since 1920. Starting with 1904, I was with the Pennsylvania Railroad at Terre Haute, in the engineering department, about a year. Prior to that time, between my second and third years in engineering school, I had one year's experience on the Pennsylvania in Ohio. After leaving the Pennsylvania in 1905, I was with the Chicago & Eastern Illinois Railroad, first as an engineer on the corps and afterwards as assistant engineer of the Illinois Division, located at Salem, Ill.; later division engineer of what is now the Chicago & Eastern Illinois Railroad, at Evansville, Ind. I was there 6 years. Later I went back to the Illinois Division, at Salem, as division engineer, and was there about 3 years; and from there I went to the Chicago division as division engineer at Danville. I was division engineer at Danville between 1915 and 1920. As division engineer at these various points on the C. & E. I., I had charge of the construction and maintenance of all the tracks, buildings, signals, and so on. It was my duty to study the operating conditions and to lay out and construct the track lay-outs at industries, mines, and so on. The C.

& E. I. Railroad serves I should say the principal coal fields in both Illinois and Indiana. There are, perhaps, a dozen or more mines on the Evansville Division, south of Terre Haute, between Terre Haute and Evansville. The Illinois division runs through the Williamson and Franklin County fields, and also the Nokomis and Whitford fields; and, in that connection, I have had charge of track construction used jointly by the Big Four and the Illinois Central in that field. The railroad serves perhaps 15 or 20 mines on each [fol. 290] division. I made an examination of the track which was recently constructed from Eldorado Mine No. 2 to the connection with the Big Four. On last Sunday morning, the 10th, I believe, I arrived at Eldorado on the Big Four train from Danville, about 8.30, I believe; took a Traction Line car, in company with the Dering Coal Company's engineer, whose name is Lindsay, and got off at the intersection of this Dering Coal Company track with the Traction Line; walked down to the Big Four right of way, and thence back over this track to the mine. At that time I had the blueprint and profile of the track. These papers you hand me are copies of the same plan and profile which I had with me. As I walked along inspecting the track, I noted the various changes of grade line, curves, highway crossings—in fact, I located myself all along in this inspection from the profile, as best could be done. I am quite sure that the track is constructed as shown on the blueprint and profile. Leaving the southeast end—at a point at the Big Four right of way—I noted the track conditions. This track is constructed of 85-pound rail, well ballasted. I noted that there was fully 12 inches of ballast along the track. In some places there is, I should say, half again as much. The track is well tied, with creosoted ties, 18 to the rail length. Tie plates are used on the curves, to make them absolutely safe. The crossings of the two railroads are of 90-pound rail. The bridge, which is located near the south end of the track, just north of the Traction Line, is well constructed, of timber piling—standard construction. (Tes. 207-213.)

It is my opinion that cars and engines may be operated over this track with reasonable safety. Comparing this lay-out with many other similar lay-outs that I have had experience with, with crossing stop signs requiring trains

to stop in accordance with the law, that is, within 80 feet of the crossing, I consider that that method of operation on [fol. 291] this track would be had with a reasonable degree of safety. I know of several similar crossings in both Illinois and Indiana. I have had to do with the construction of tracks where a similar type of construction was used. I made an examination of the end of this track where the proposed connection with the Big Four would be made, and also of the point in the Big Four track where that connection would be located, and it is my opinion that such a connection could be made without materially increasing the hazard of operation over this Big Four track. I did not make an inspection of the switch running into the Wasson mine, located a short distance east, other than to see it a distance of about a quarter of a mile away. I could see that there was a connection there and a switch-stand.

My operating experience has been in the sense of keeping tracks open for operation; and, as such, I do know something about operation. I have had nothing to do with operation of trains. My opinion is that the mine closer to the assembling yard will get more uninterrupted service than the mine that is, say 50 miles away. I mean that, in case of interruption of traffic, there is a distance of 50 miles additional movement of trains over, in this case, a branch line, which is not maintained with the same degree of service that the main line would be maintained. From the fact that at that distance from that assembling yard, that is, in that 50 miles, there are just that many more chances of interrupted service, such as delayed trains which interfere with the meeting points of other trains which are bringing loads down, broken rails, snow conditions, washouts, and such things as that. There are always such elements, which involve additional service. I have in mind that the forces on branch lines have been, in my experience, used to open up the main lines. In southern Illinois, in my experience, I do know of cases where we had trains blocked in cuts by snow—not over 2 days at the most. I do know of a case, in Indiana, where part of a branch line was [fol. 292] blocked for a week. I think it would be only under unusual conditions that my answer would apply.

By Mr. Cardy:

"Q. As a general proposition, are the empties handled from the assembling yard where the mines are located within switching distance by the switch engines? That is, the flow of empties is to the south, we will say; they go to the assembling yard and are, in the morning, switched by switch engines to the various mines adjacent to the switching district. Is that the practice, if you know?

"Mr. Gillespie (interposing): I object to that. The witness has testified that he does not know anything about operating at all.

"The Witness: I have been delegated on special work by the general manager of the C. & E. I., to work on just such problems."

In mine districts, within reasonable distance of the assembling yard, the movement of empties to the mines and the roads back from the mines is done generally with yard engines. If there is just a mine or two at the end of that 50 miles, the chances would be that it would depend on schedule or other freight trains doing local work along the way. In southern Illinois on the C. & E. I. and in southern Indiana, the main line is given attention first; and naturally there would be better service. I cannot say what proportion. I could not base that on any percentage. In my opinion, I would say that the service usually accorded on a branch line is substantially comparable with the service accorded on a main line; that is, the two compare on a parallel basis. It is not the practice of the C. & E. I. to accord mines on a main line preference over mines on a branch line. I said that in case of shortage of power, failure of engines, etc., they would give the main line the best of those engines, because of the interruption to other trains; and my argument is along that line.

[fol. 293] "Director Bartel: Take, 1922, right after the shopmen's strike. Do you mean to testify that during those periods, when there were power difficulties, the main lines secured preference over the branch lines?

"The Witness: I have had no railroad experience since 1920." (Test. 213-220.)

I am in the retail coal business at Danville, Ill., and have been since I left the C. E. I. in 1920. I am on the Illinois Central, but being in the Danville switching district, I am practically located on all the roads. It is always my practice to give preference to a mine or operator located on the most direct line which I can get the best service, but I would not say regardless of the quality of the coal or the price. I would be willing to pay a little more for service. I would restrict that on the basis suggested. Other things being equal, I would purchase my coal where I could get the best service. I purchase most of it from the Clinton, Ind., district, on the C. & E. I. I have bought some from southern Illinois. The Ogara Coal Company is the concern I have been buying from. I think they are located at Harrisburg, or near there. I would not buy any on the Illinois Central, the conditions being the same. That is because of the fact that the service would not be the same, on account of a two-line haul. I would like to say that that is a very important factor in the success of a retail dealer—that is, the service that one can get. We can call up on the telephone today, and perhaps we can get a car of coal day after tomorrow, which enables us to unload direct from the car into trucks and deliver the coal at a saving of perhaps 15 to 25 cents a ton. My establishment is on a private siding of the C. & E. I., but within the switching district of Danville. We have service from the railroads without additional switching. A good part of the coal that I buy from the Harrisburg district—I won't say all of it—I unload off the team track, and that eliminates switching. Truck it from the car to destination. (Tes. 223-225.)

[fol. 294] "By Mr. Cardy:

"Q. Would you say that the practice of the local coal dealers to purchase coal from mines on railroads on which they are located is common practice, if you know?

"Mr. Connnell (interposing): I submit that the witness has not qualified as knowing anything about the practice of coal dealers other than at Danville.

"Mr. Cardy: If he knows, I said.

"By Mr. Cardy:

"Q. Do you know what the common practice is?

"A. I know nothing except by observation. I have certainly observed those conditions; and I know it to be good judgment and practice generally."

I know nothing of the operations on the Big Four, other than what I gained from an observation of the conditions on the ground last Sunday. (Tes. 225-227.)

H. F. MILLIGAN was called as a witness and, having been first duly sworn, testified as follows:

Direct examination:

H. F. Milligan is my full name. I am Division Superintendent of the Big Four located at Mount Carmel, Ill. I am very familiar with the tracks of the Big Four between Harrisburg and Danville, Ill. Between Harrisburg and Danville, we have about 40 miles of double track, extending between Harrisburg and Eldorado; between King and Cone; through Mount Carmel, and from Ross to Danville. Between Harrisburg and Eldorado, there are two tracks. Referring to the plat with the complaint, those two tracks are both the same. There is a lead at Eldorado; but those tracks can be used in either direction as a main track against the current of the traffic. At Eldorado, referring to the most northerly track, there is a connection with the other track. The most northerly track ends at Harrisburg. It switches into the assembling yard. The other track goes on south to Cairo. The most northerly [fol. 295] track is used for the handling of trains and engines and switch movements and various other movements between those points. It is used for passenger trains whenever the other track is blocked. They are two main tracks. When there is a coal train on the main track, we used the main track, the same as any other track. We have switches connected with that particular track leading into the following mines: Ogara 10, Wasson 1, Ogara 1 and Ogara 12. We always use that track as a main track, and use it as against the current of the traffic when the other track is blocked. I could not say how many times a day we have

a passenger train pass over that track. Some days the passenger train does not use it at all. Approximately 20 to 25 trains a day, and engines, use this so-called running track or northerly main track.

"Q. And are those mostly switch engines and engines handling coal trains—loads and empties?

"A. During the times the mines are plugged, but at other times we handled the trains on that main track."

Primarily, the use to which this track is put is to serve the railroad. I think about 95 or 96 per cent of out traffic is coal traffic—that is from this division, the Cairo division. We have 4 passenger trains each way on this line that used the other track daily—the main track; two southbound and two northbound; two in the morning and two at night. (Tes. 228-233.)

Cross-examination:

The part of the railroad that I operate runs from Danville to Cairo. That is a main line railroad. It extends simply between those two points and is operated as a separate line of railroad. The Cairo Division crosses the main line of the Big Four at Paris, Ill.

[fol. 296] The line from Danville to Cairo has no connection with any other branch of the Big Four than that, except at Harrisburg, on the Saline Valley. The Saline Valley is a main line railroad, but it branches off the Cairo Division. The track that has been referred to here by Mr. Cardy as a second track, the one that I say is a main track, is used, from an operating standpoint, whenever it is necessary. That is, all during the day time and during the early evening hours, that track is practically set aside for the movement of coal—coal and empties to and from the various mines. We serve 8 mines on that particular line, and we handle approximately 275 to 280 loads daily and that many empties; that is, on this particular track. But during the time that it is not being operated to handle these cars, we operate it as a double track. For main line movements it is operated by the train dispatcher. With respect to switching movements—delivering and pulling cars from the mines—it is operated by the train dispatcher. During the time that they are pulling and filling the mines, the mine engines protect against themselves. During the

time when the yard movement is over, we handle the track by train orders and run it against the current, the same as you would on any other double track. During January of this year; we had the largest year in the history of the field—that is, the largest month in the history of the field. We loaded 12,483 cars. On each of these tracks—on the northbound and southbound main tracks—in one 24-hour period we operated a total of 47 trains. Back early in 1922, I made a very extensive report to my general superintendent, based on information that I had that Ogara expected to sink another mine close to this track and be served by this track; that we could accept no more business and handle it on this track without further facilities. That was submitted in July, 1922. In the fall of 1922, I was informed by my trainmaster, who is located at Terre Haute, that the Dering Coal Company proposed a connection in [fol. 297] the vicinity of the Wasson Mine—which was merely at that time rumor. I immediately notified my general superintendent that, if this was a fact, together with the additional mine that the Ogara people expected to sink, we must have additional facilities in that vicinity in order to handle our business the way it should be handled. From my transportation experience, the tracks are to capacity right now.

In my judgment, no additional business could be added to these track facilities that we have between Harrisburg and Eldorado in the peak of business with reasonable safety—that is during a month the same as we had in January. My experience as a railroad man has been varied. (Tes. 234-237.)

In 1900, I started as lamp boy, hanging lamps on the Chicago Division of the Big Four. During the time that I was hanging lamps I studied and finally became an operator. In the following year I was made a telegraph operator on the Chicago Division and continued in that capacity at various locations on the Big Four Railroad until 1905. In 1905 I was made a train dispatcher. I dispatched trains until 1910. In 1910 I was made a chief dispatcher on the Cleveland Division of the Big Four; and in 1912 I was made a trainmaster on the Peoria and Eastern Division of the Big Four. In 1913 I was transferred to the Cleveland Division as trainmaster; remained as trainmaster until the outbreak

of the war, when I was made General Agent for the American Railway Association, having control of traffic and transportation, at Fort Benjamin Harrison, for the State of Indiana. In 1920 I was made assistant superintendent on the Cleveland Division; in 1921, superintendent of terminals at Cincinnati, and in March, 1922, superintendent of the Cairo Division of the Big Four.

Aside from the train movements, we have had 25 yard movements on the track between Eldorado and Harrisburg in a 24-hour period. During such a period, the track is so busy that it is necessary for me to keep the trainmaster [fol. 298] at that point the majority of the time. He spends practically all his time at that location. The south end of the railroad is under his control absolutely—from Mt. Carmel to Cairo, a distance of 135 miles. It is necessary to have that trainmaster there on account of the congestion and handling of that traffic. (Tes. 237-239.)

Redirect examination:

Those 25 switch movements are movements of switch engines up and down that track, placing empties and taking loads out. The average number of trains moving over that division during a normal time depends on the mines that are working and the number of cars that we have north of Harrisburg. Most of those through trains northbound would pass over the main track, and not go on this track, during the day period and early evening period, but at night we use it as a double track, naturally. From an operating standpoint, we have determined that it is the most economical way to handle it to have this track used by the switching engines in placing empties and getting out loads. We have had as high as 25 switch engines in one 24-hour period operating up and down this track—not in the assembling yard, but using this track between Harrisburg and Eldorado. The distance there is 11.2 miles. We have had 25 engines operating on this one piece of track. Not at one time; but during the period. 25 different moves. It not necessarily might have been only 2 engines making 13 moves apiece. We have had as high as 4 or 5 engines out there at a time. It is owing to conditions. We have 4 mines between Harrisburg and Eldorado that are adjacent to this track; but we serve four other mines from this track.

They are located at various points on the L. & N. Railroad and on the Illinois Central. We serve mines on connecting railroads, because Ogara 10, as I understand it, was formerly a straight Big Four operation. I cannot substantiate that, but that is my understanding. Later the Illinois Central built tracks to this mine and served the mine.

We serve our mines in that particular vicinity on what [fol. 299] we call the "round Robin System." That is, we run just as many mines as we can with the car supply, giving each mine that is running a full day's run. When we reach Ogara No. 10, the car supply to his mine is determined on the number of cars which have been furnished by the Illinois Central. It is a joint mine service; it is not a mine served exclusively by the Illinois Central and never was so served. We call this other mine an L. & N. mine—in other words, the L. & N. refused to give them a connection, and they constructed a private track, over which the Big Four has trackage rights.

By Mr. Cardy:

"Q. In getting into this so-called passing track, or whatever you might call it, from the main track, do you have to furnish a switch?

"A. At what point?

"Q. Where it connects.

"A. That is Hannibal, and there is an interlocking plant there. We do not stop our trains there in either direction." (Tes. 239-242.)

Recross-examination:

In getting from one track to another on any railroad, it is customary to have some sort of a switch or switch tenders, otherwise, as a rule, the trains would be running together. (Tes. 243.)

J. W. HUNTER, heretofore duly sworn, was recalled and further testified as follows:

Direct examination:

I have heard the testimony of Mr. Milligan just given. Taking all the facts given by him and the situation as described by him, it is my opinion that this track can be connected with safety. I will go further and say that, if all this movement about which I have heard in the testimony was over one track, in both directions, it could still be con- [fol. 300] nected without unreasonable hazard. In my judgment, it would not materially increase the hazard of operation over this track of these trains that Mr. Milligan has mentioned. (Tes. 243-245.)

Cross-examination:

I should say a good many more movements than I have heard of would have to be made over these tracks before the additional movements on that track by reason of an additional connection would increase the hazard. I would say that that track was there for all connections which might be made into it. It could not possibly be built with connections with every rail in the track from Eldorado to Harrisburg. As to how many I think could be put in between Eldorado and Harrisburg, a distance of about 10 miles, I would not hesitate, if the business was there and I had charge of it, to put in one every 3 or 4 hundred feet. I would still substantiate my position that they could operate still an additional connection, and it would not, even in that case, add materially to the hazard. I said I bought coal from the Ogara Coal Company; I have not bought more than perhaps half a dozen cars. The last car I bought was last fall. I do not know how much coal goes to Danville from the Harrisburg District per annum. I am sure I don't know if this coal that I got from the Ogara Coal Company came from the main line of the Big Four or from the Harco Branch. I do not know which. I did not ask that question, before I bought the coal, as to what line it would come over. I buy most of my coal from the Clinton District on the C. & E. I. That is not always a two-line movement; it is a one-line movement. I do not understand that all I buy from off the Big Four is a two-line movement; the

Big Four runs right into Danville from Harrisburg and it has been our custom to handle it from the Big Four. I buy coal from West Virginia, and I think perhaps that is evenly divided between the C. & E. I. and the Big Four. It is so far away that it, perhaps, does not materially affect the movement. It is true that we have a two-line movement to [fol. 301] our place of business even if it does not come in over the C. & E. I. The Pocahontas coal always has more than a two-line movement. It happens that I ship coal from West Virginia over the Big Four, and thus have to add another line movement, this way: The coal I buy from West Virginia I buy from a jobber, and I think that practically all of it is en route before it is consigned to its destination; and I have to take it as it comes. I have never discovered that the movement of coal coming over the C. & E. I. and to my place of business was a two-line movement; I have not discovered it yet. I know it is a one-line movement. If a carload of coal comes over the Big Four, consigned to me, it is set on a team track. We have one yard, located on the Big Four, where we handle sewer pipe and other things. Our place of business is located only half a block—within half a block of the Big Four team track. We handle coal direct from the Big Four team track; we take it that way to the consignees to whom we sell it and it does not pass through our intermediate yard. Coal coming from West Virginia does go to our yard, regardless of whether it comes over the Big Four or the C. & E. I. We so handle it because we always want Pocahontas coal in our yard. If we can save an additional movement, we always do it. So far as everything that I have observed is concerned, I think the crossing is absolutely safe. I think the grade crossing is a safe crossing. I know there are hundreds of them operating and operating safely, and with the approval of commissions which decide that they are safe to operate. That has been my experience. I know of many cases where commissions have permitted their installation, and I assume that they considered them safe. I think it is safe to assume that they were intelligent men and made a proper decision. (Tes. 245-250.)

My whole engineer and railroad experience has been that they consider the traffic moving over these crossings and make a sane and reasonable examination of the conditions [fol. 302] and render their decision accordingly. I do not

know of any case where an unwarranted amount of money was instructed to be spent by a commission to eliminate such a crossing. When I, as an engineer, was determining whether there ought to be protection at a crossing, I always took into consideration the number of train movements over that crossing, and always took into consideration the matter of obstructions to the view in approaching it. I always considered the degree of curvature at which the crossing occurred. We considered everything we could think of. In this case I know nothing about the number of train movements over these crossings—outside of what Mr. Milligan testified to and assuming his testimony is correct. I know at what degree of curvature the Illinois Central is crossed by this proposed track. It is nine degrees. I was going to look at my papers to see just where that curve began. I did look at it on the ground. I checked these drawings on the ground. I did not take any measurements. I looked over the ground and observed the conditions. I did not check the curvature with an instrument. I saw the conditions on the ground and looked at them. I have had 15 years' experience in looking at curves which were perhaps 2, 3, 4 or 9 degrees. Now, I can look at the ground and tell what it is approximately. Without looking at the paper, I say it is about 9 per cent. I looked at the paper to see where it began. My impression is that it begins just at the Illinois Central crossing. I think that crossing is a safe crossing, if there are, say, 20 trains operated over each track a day. As to the obstructions around there, I stood on the crossing and looked around. I did not see anything that I thought would be an unusual danger in approaching that crossing. I looked all around at the Traction Line crossing and it seemed to me that the conditions appeared safe. I did not ask about how many train movements there are over the crossing. I got in about 8.30 and got my breakfast and was out there a little after [fol. 303] 9. Then I walked over the track. And the mine superintendent took us in in his automobile to meet the 11.20 Illinois Central train, and we just barely made it. I did not check up with my watch, but I must have been walking over the track a little over an hour—going over the track from one end to the other. We got off the Traction Line and went up by automobile to the Illinois Central end. I consider this a very fine track, for a track to a mine lay-out.

I have seen main line tracks not as good; plenty of them. I commenced working for the C. & E. I. at Salem along about 1911. I would not want to say that, along about that time, there was not one-fifth of the ballast on the C. & E. I. from Salem to Thebes that there is on this track now. I know that I had a whole lot to do with ballasting that end of the C. & E. I. It was fully ballasted when I went there in 1911; in part with cinders, not most of it; some gravel ballast. I had a lot to do with putting the rock there; but then there was considerable gravel. (Tes. 251-256.)

"By Mr. Gillespie:

"Q. With the number of track connections that you say might be put into this track with safety, leaving the mines, and with the consequent business that might be handled over it with safety, that would make about 110 connections between Harrisburg and the location of this mine. Now, that would make practically a lead track, would it not—kind of a ladder track, as they call it. That would make a kind of ladder track, would it not, to your yard?

"A. It would look like it, yes."

I did not say I thought a ladder track just as safe as a main line track with no connections in it. With every additional connection that is put in to a main track, there is naturally that much more maintenance on that track. In every railroad movement there is a certain hazard. With 13 movements of any kind, there is just one-thirteenth of the hazard. If you increase them from 12 to 13, or if you increase them in any case, you have just that slight addi- [fol. 304] tional hazard. What I mean is that an additional connection would not materially increase the hazard. (Tes. 256-257.)

I have had no experience in the distribution of cars and I have had no experience in the actual movement of cars from the point of classification for distribution to the mines on the railroad. I have not taken into consideration anything of that sort in my testimony about delays that might result in the movement of cars from the point of classification for distribution to the mine. I did not take into consideration the fact that I never had any experience with the distribution of cars. I did not take into account the

fact that I have ever actually handled any of that distribution. My testimony was based altogether on observations that I had made and associations with operating men, and related to the keeping of the track open. It is true my opinions are not based on any observations I made of the method of car distribution.

"Q. Suppose the classification of cars for distribution should be made at a point more distant than 50 miles on the Big Four Railroad, from the point of actually distributing the cars to the mine, what would you say with reference to that as compared with a point 50 miles distant from the place where the distribution is to be made?

"A. I should say in that case the facility of distribution would be based on the distance. That is the basis of my testimony." I believe I referred in my testimony to the distance and to the difference—well, the difference in the physical condition of the railroad over which that distribution was made, that is, as to whether it was main line or branch line. If a main line was not as well maintained and operated as a branch line, the branch line would have the advantage, so that the matter of operation would have to be taken into consideration even in that event. (Tes. 258-261.)

[fol. 305] I have never had any experience in the movement of trains. My idea is that in the operation of trains, there are certain features there other than the exact control of the men operating those trains. I have had quite a lot to do with the safety of those trains in their operation. I would say the design of the track lay-out; the design of the facilities for operating those tracks. I have had quite a lot to do with that. The extent of my experience is the fact that I had a lot to do with it. I had nothing to do with the direct movement of trains or the control of the trainmen moving the trains. I did not locate any conditions where I designed a track that, after it was built, I was called upon to re-design it because it was not practical to operate it. We usually go into that very fully in the designing of the tracks. I would not be surprised but what there had been changes and modifications made later, but I would not say they were made because it was not practicable to operate the tracks in their original condi-

tion. I would say in the development of business that there have been times when I was called upon to consider the operating conditions that developed in the use of that track and we have at times added to layouts and modified them. I do not believe I ever designed a track where the engines could not get around without getting onto the ground. I have heard of tracks where engines could not get around. The presumption might have been that some engineer designed it. I do not know. As to what I mean by "yard engines": I consider a yard engine an engine acting under the instructions of a yardmaster, regardless of its size. If the engine was turned over to a yardmaster to operate in the operation of a yard, it would be a yard engine, regardless of how big it was.

There might be some conditions where there would be a difference in the size of the engines, necessarily, when com- [fol. 306] paring those serving a mine near an assembling yard and those that serve a mine 20 or 30 or 40 or 50 miles from the assembling yard. I do not recall just what they would be right now. I would not think there would be any difference in the size of the engine because of the distance from the yard. Usually the same size engine, unless there was some other feature.

"Q. Isn't it a fact that practically the only difference is that one engine might have steps on both ends and the other would have steps on only one end—footboards, rather?

"A. I do not know whether there would be any other difference or not. There might be. A railroad would use the engine available, and if they had to put an engine into the yard service they would probably put the steps on it. I think the law requires it for the safety of operation." (Tes. 261-264.)

My definition of a yard engine is any engine operating in the yard under the directions of the yardmaster. It might move out to the main track, but under the directions of that yardmaster. It would be very possible that yard engine might be twice or three times the size of any other engine operating on the road.

I am in the operating department; I never operated engines. When I say that, I mean now, but I was until I left

the service. I did not have control over the distribution of engines. I base my statement that, during periods of power shortage, failure of engines, the main lines get the best of the deal over the branch lines, upon observation and experience. I was associated on the staff of the superintendent whose duty it was to do that, and I know in a general way what he did. He did not always come to me and tell me what he did; sometimes he did. Just in conversation. The kind of men I worked for usually were willing to impart knowledge of that kind. I presume that I have been told by the superintendents on the lines with which I have been connected that they have given the main lines the advantage over the branch lines. I know it is a fact [fol. 307] that they do it, whether I have been told directly or not. I know it to be a fact because I was in the operating department up until 4 years ago. The railroad I worked with did not have a maintenance of way department. We were an organization wherein the division superintendent and his staff controlled all the things on that division, regardless of whether it was maintenance of way or equipment—not equipment, but maintenance of way or operation of trains. On the railroad I worked for, the superintendent directed the distribution of engines—the superintendent as distnguished from the superintendent of motive power. I have worked on the Pennsylvania and I know that is their operation, too. I was in the engineering department on the Pennsylvania. That was 15 years ago, in 1905. I was assistant of our engineering corps at Terre Haute. Before that time I was assistant on the engineering corps for a year at Zanesville, Ohio. I have carried chains and spikes. I have laid out mine lay-outs on the Pennsylvania Railroad. I never had anything to do with the operation of trains on the Pennsylvania or on any railroad.

"You made some statement regarding the practice of coal dealers in purchasing coal at mines located on the line which also served their coal yards. What observation have you made? What do you know about the coal business outside of what you see around Danville

"A. On the railroad I worked for, for 15 years, I was pretty intimately associated with the traffic man on that division. I have been with him on trips of inspection, on

motor cars, and I have heard him investigate conditions along the railroad."

That is Mr. H. V. Bowman; on the C. & E. I. Railroad. He was General gent for a large part of the Chicago Division of the C. & E. I. That division is between Terre Haute and Chicago, and between Chicago and Villa Grove; the north end of the railroad. He has more business than to solicit traffic; he has jurisdiction over the agents. I can- [fol. 308] not recall any specific instances what he told me concerning where the coal dealers bought their coal. (Tes. 264-268.)

In my present location at Danville is the only coal business I have ever had anything to do with. I do not know where the Chicago coal dealers all buy their coal. I know where quite a few buy it. I could not name them. I know they do not all confine their purchases to the mines located on the rails of the road that serves their bins. I think perhaps most of them do it. I do not know the names of those that do it. I know the coal moves from the C. & E. I. mines to Chicago, and it is spotted on tracks there. I do not see how it would get there any other way in C. & E. I. coal cars. My observations are the extent of my information—merely the general observation of conditions. I have no specific instances to give you at all. I do not know what percentage of the coal that is hauled to Chicago by the C. & E. I. is delivered at coal yards local to the C. & E. I. I do not know that 1% of it is; I would not want to make any estimate whatever of the percentage. The C. & E. I. operates into Chicago over the Chicago & Western Indiana. The C. & E. I. have yard tracks at 33rd street, Chicago.

In my answer regarding the hazard of operation or rather, the increased hazard due to the additional switch connections, my answers were not based solely on the connection itself, but I had in mind the operation. I had in mind the operation of engines and cars over these connections. It is my statement that an additional connection and the fact that a number of cars had to be handled over that connection would not materially increase the hazard of operation. I maintain that the connection with the Big Four and the operation of cars on it will not materially increase the hazard of operation; I have reference to the particular connection we have in mind. (Tes. 268-271.)

I assume right on the face of it that when a switch engine goes out to operate over a track it has to take certain [fol. 309] chances of running into another switch engine or running over someone and killing him, and if you put two engines on, perhaps you would have twice the hazard. I don't think you would have twice the hazard on that same engine, but you would have an additional hazard with an additional engine. Every railroad operation has a hazard. I do not know that it would materially increase the hazard of operation of the railroad of that district as a whole.

"Q. That is the addition of one more engine?

"A. I still maintain that."

As to whether I think, even though there might be 3 engines operating on the track, the hazard would be no greater than if there was only one: I have already answered that question, I think I have explained myself, that there would be no additional hazard. I still maintain the hazard would not be increased above that ordinarily expected in railroad operation if two engines were operating on the track instead of one.

"That is, the operation of two engines versus one. That is what we are talking about now.

"A. No; I imagine that there would be just one there at a time."

There would be a greater hazard if two engines are operating over a particular track than if only one engine operated over the track. (Tes. 272-273.)

I suppose that the hazard would be greater if there were 3 engines on that particular track than only one. (Tes. 273-274.)

J. R. Fenton was called as a witness on behalf of complainant and, having been first duly sworn, testified as follows:

Direct examination:

My full name is J. R. Fenton. I am assistant to the Vice President of the Dering Coal Company, Mr. James B. Pauley. I have been connected with the Dering Coal Company [fol. 310] since 1918. I have charge of the production, sta-

tistics, cost statistics, comparative car supply records; also keeping in touch with the operating program. My residence is in Chicago and my office also is in Chicago. I try to spend about half of my time between the mines and the Chicago office.

Prior to my connection with the Dering Coal Company, I began working for the Peabody Coal Company in Montgomery County, Ill., at their Taylor Springs mine, in 1912, as the manifest clerk, or billing clerk, having charge of the consignment of coal and the ordering of cars. That is the clerical work in connection with ordering cars. I was later made chief clerk at the Kortkamp mine, at Hillsboro, Montgomery County, and in 1914 I was made chief clerk at the Nokomis mine at Nokomis. I was after that employed in the same capacity by the Peabody, Dering and Wooley receivership, and in 1916 I was in the employ of Mr. T. C. Keller, the Receiver of the C. & E. I. coal property. I was in the service of the Dering Coal Company when Mr. Dering operated the Ogara mines during the receivership in the capacity I have stated heretofore, assistant to the Vice President. I took a special interest in production, costs, and in the clerical work. I had an idea at that time that I wanted to be a superintendent of mines, and did about everything I thought I could do to accumulate an education in the coal business. I have prepared a statement showing the running time of Dering mine No. 2 located at Eldorado. There are 5 sheets in my first statement, setting out the potential operating time, the time operated, time lost by the Dering Coal Mine No. 2 for the months of October, November, December, 1922 and for January and February, 1923. We have from our mines daily what we call a wheel report, which gives the vital production statistics of the previous day's operation or shut down, as the case may be. It was from these reports that came to me that I drew this information shown here. I took those particular months because they are the most recent months [fol. 311] of car shortage prevailing on the Illinois Central and the Big Four.

Mr. Cardy: I will ask that this exhibit be marked No. 14.

Mr. Gillespie: We object to that because the witness has already stated that he has selected the period when there was an extreme car shortage, and not a period that is fairly

illustrative of normal conditions on the two railroads, and for the further reason that the witness might have gone on and said that this car shortage resulted after a long period of strike in Illinois, which resulted in an absolute coal famine in the State.

Director Bartel: That would go to the weight of it and not to the admissibility of it.

(The papers referred to were received in evidence as Complainant's Exhibit No. 14.)

I have prepared a similar exhibit for a different period, which also consists of 5 pages. This exhibit comes from the daily reports of running time and production statistics that I receive every morning. It is true and correct.

(The papers referred to were received in evidence as Complainant's Exhibit No. 15.)

Exhibit No. 15 covers the period from August to and including December, 1923, and shows as against the potential operating time the hours operated, the time lost on account of no market, and the time lost on account of no cars. The purpose of Exhibit 15 is to show the extent of time lost by this mine by reason of no market, primarily. The purpose of Exhibit 14, as I believe I have stated, is to show the comparison of running time and the time lost on account of no cars during the last period of car shortage. I would say that these two periods, one a period of car shortage, and the other a period of ample car supply, are typical of normal periods of car shortage and over car supply. The average running time for the 5 months' period on Exhibit 14—in time of car shortage—is 41.9%. During the period when there was a full car supply, and no market, the [fol. 312] running time was 43.7 per cent. (Tes. 274-279.)

I have prepared a statement showing the running time of other mines in Saline County during the same period and compared it with the running time of the Dering Coal Mine No. 2. It consists of 5 pages, 4 pages of detail. This is prepared and is a summation of the information received weekly from the the Honnold Coal Bureau, which prepares weekly a comparison of running time and time lost for all of the coal companies in Franklin, Williamson and Saline counties. The subscribers to the Honnold Coal Bureau, or let us say members, furnish information daily to that

Bureau from their mines, setting out their operating time and their production, etc. All of this information is reproduced on one form and is given to the Geological Survey and also circulated among its members and subscribers. This exhibit is taken from the reports that the Honnold Bureau sends to the Geological Survey. I have the weekly reports received from the Honnold Bureau. These reports are received by the company, and come to me in the usual course of business. This exhibit is accurately and truly compiled from the reports.

This Honnold Coal Bureau is maintained by subscribers, and the subscribers are the coal companies. Mr. Honnold is not an official in the Illinois Coal Operators' Association; he quit some time last summer. Up until that time he was an official of that company. My impression is that he did not organize this Bureau before he left the secretaryship of the Illinois Coal Operators' Association. He resigned as an officer of the Illinois Coal Operators' Association and then formed this Coal Bureau. The present statistician for the Illinois Coal Operators' Association is named Fernekorn, and they have offices, I think, on the 16th or 18th floor of the Fisher Building. This Coal Bureau is a thing to which most anybody can go and get information. It is not linked up with the operator's association in any respect. I cannot say if Mr. Honnold is a member of the [fol. 313] Illinois Coal Operators' Association. Dr. Honnold at the time he was an officer of the Illinois Coal Operators' Association was always in demand and always did prepare a lot of statistics for the coal industry. He may do so yet, but as an associate and at somebody's expense.

I have the original reports from which this data was prepared. That report was received by me in Chicago from the Honnold Coal Bureau. Approximately 150 mines are in there. Practically all the coal companies in southern Illinois were members of that Bureau. This report is distributed among all of the members of that Bureau, together with being sent to the Government, the Geological Survey. They are weekly reports that come to me.

Director Bartel: It will be admitted, subject to objection.

(The papers referred to were received in evidence as Complainant's Exhibit No. 16) (Tes. 280-284.)

On Exhibit 16, I could not say if any of the mines listed are what are called assigned car mines.

Exhibit No. 16, sheet 1, so-called, is typical of all the sheets. It sets out all the mines on the Big Four which are covered by these reports, their names, and their railroad connection, and number of hours worked by weeks, as shown at the top of the column. It does not include all the mines of the Big Four; the particular mines selected are members of this Bureu. Other mines are not. There are some little mines down there that are not members of the Bureau, and I do not think the percentage would be disturbed. The total production of Saline County is approximately 4,000,000 tons per annum. The Harrisburg Colliery Company is not on here. They would produce 500,000 tons per annum. There are perhaps 3 or 4 small operations in a strip mine that are not on here, that would produce 200,000 tons. So that we have about 15 to 17% of the tonnage not in if my arithmetic ie correct. The purpose of this exhibit is to [fol. 314] show the comparative running time of 16 mines on the Big Four and 4 joint mines on the Big Four, Illinois Central and Louisville & Nashville, with the running time of 2 local mines on the Illinois Central in Saline County, one being the Dering Coal Company Mine No. 2, and the other being the Big Creek Coal Company No. 5. It is made up in detail to show the method by which the computations are arrived at on page 1, which is the recapitulation sheet and shows as follows: The 16 mines on the Big Four had 62½% running time; the 4 joint mines on the Big Four, Illinois Central and Louisville & Nashville had 69½% running time, and the 2 local mines on the Illinois Central had 41.3% running time. The period covered by this exhibit is from October 1, 1922 to March 3, 1923, and is the last period of car shortage. All these mines are in Saline County. I have prepared a statement showing the distribution of tonnage which originates in Saline County. The information thereon was obtained from a distribution report which is made up by the Honnold Coal Bureau. I have the original report from which this information was drawn. The statement is accurately and truly compiled.

Mr. Cardy: I will introduce Exhibit No. 17.

Mr. Gillespie: We object to that on the same ground as the others, that is, that it is from the Hounold Coal Bureau.

Director Lartel: It is accepted subject to the objection.

(The paper referred to was received in evidence as Complainant's Exhibit No. 17.)

Exhibit No. 17 is a statement showing the distribution of shipments of coal and percentages of total shipments to 5 districts, comparing 4 competing companies in Saline County having Big Four service, with the J. K. Dering Coal Company, having Illinois Central service. (Tes. 284-289).

[fol. 315] The four competing companies, as far as I know, are the Ogara Coal Company, the Wasson Coal Company, the Southern Counties, and the Big Creek Coal Company. These companies are shown on Exhibit 16, pages 1 to 4, the only difference being that the Southern Counties Coal Company is shown here as the Peabody Coal Company No. 20 mine. Exhibit No. 16 has 5 coal companies shown, whereas Exhibit 17 contains only 4 competing companies, because one is repeated; the Big Creek Coal Company is repeated.

Exhibit No. 17 sets forth for the year ending March 31, 1922, the following information:

That 4 competing companies shipped 963,000 tons of coal or 25% of the total output, to Illinois, except the Chicago switching district; that the J. K. Dering Company shipped 43,569 tons to those same destinations or 14.3% of their total tonnage; that the so-called 4 competing companies shipped 765,534 tons to Chicago and the switching district, which was 20% of their total distribution. I believe the exhibit is self-explanatory. The purpose of Exhibit 17 is to show the constriction of the market of the Dering Coal Company mine No. 2. Dering Mine No. 2 does not object to shipping so much coal to Chicago, but the figures there show 57% of their total output goes to the Chicago market. Let me say another thing, and that is that .4% of their total output goes to the Chicago-Indiana switching district, and that 1% of their output goes to Indiana except the Chicago switching district, while these 4 competing companies shipped 14.3% of their total output to Illinois except the Chicago switching district, a thing which

I have tried to visualize many times. It seems to me it shows our markets are restricted in Illinois, we will say, almost exclusively to the Chicago switching district. And, further, given an outlet such as these mines have on the Big Four Railroad, we ought to distribute and sell more tonnage than we do in these districts where I have pointed out this proportion. (Tes. 289-291.)

[fol. 316] We do not think we would give up some of the Chicago tonnage. If we ship a large proportion of our tonnage into the Chicago district we would be able to hold it, I think. This period ending March, 1922, was when we had a full car supply, and that is why we selected it. The car supply feature is not the thing I have in mind here. In 1922 ending March 31, there was no appreciable car shortage. That was a year when the coal companies were competing and competing very keenly among themselves for business. That is a normal period which we can reasonably expect in future years, and it is my idea that with a mine which is not developed to its full capacity we ought to have service that would permit us to get into these territories where this disproportion is shown in tonnage in keenly competitive times—not necessarily a period of car shortage. There are two times, I should say, a keen competition; one is when there is a car shortage and one is when there is not. Competition during times of car shortage is not so much for business as it is for service, and in times of full car supply then it is for business.

"Q. Here is what I am getting at. This covers a period when you had a full car supply and you shipped this tremendously heavy tonnage to Chicago. Take a period when you would run into a car shortage, where would you ship your coal? You would have to eliminate some of your Chicago customers, wouldn't you, if you shipped it elsewhere?

"A. Let us boil it down to just one proposition I have in mind. Let us assume a car shortage and assume that 57% of our tonnage goes to the Chicago market."

"Q. That would not be 50% of your tonnage in your car shortage period. This is 57% in a 100% car supply period.

"A. That is right."

As far as cars were concerned, our mine was running full during this period. The trouble then was, if there was

trouble, the fact that we could not move all the coal we [fol. 317] stood ready to mine, but on account of no market. The point you are making here is if our car supply was 50%, approximately, we would have to cut our Chicago shipments down to 25%—where normally they are 57%. I do not think that would hold good. The exhibits do not show how much we were running during this period, and I have not that information. (Tes. 291-294.) This is for the year ended March 31, 1922. I havn't the information as to how many days we operated. (Tes. 294.)

Referring to Exhibit No. 16, and answering your inquiry as to the cause—one of the causes—based upon my experience in the coal business, for the lack of running time of Mine No. 2 of the Dering Coal Company as compared with other competing mines in Saline County: That is a subject which is always of very much importance to me. This mine has a very poor, let us say, production history. It is 7 years old and should have reached its full capacity long ago under normal conditions. The reason that it has not reached its normal capacity is by reason of the inadequate railroad service and lack of markets. I have had experiences with mines where in 3 years with adequate railroad service, which meant a substantial outlet to markets, they would have reached their capacity. Regardless of the percentage of car supply prevailing these mines operated and got up to a capacity for which they were designed. That was due to the fact that they had the opportunity to run and the fact that they could sell their coal. They sold it to some of the railroads—not on the assigned car basis. I am speaking of back in 1915, 1916 and 1917. The assigned car order was perhaps in force then. I can state an example. At the time I went to the Nokomis No. 10 mine which at that time was a very large property located jointly with the C. & E. I. and the Big Four, it was producing from 1,200 to 1,400 tons per day. In March of 1916 that property produced 5,767 tons per day, which was the state record at that time. The Nokomis Mine is not the Pittsburgh Plate glass mine; it was at that [fol. 318] time nominally the Peabody mine, but was a C. & E. I. coal property. To my knowledge it is not operated now by the Pittsburgh Plate Glass Company. At

that time it was producing coal for the Frisco Railroad up until the time the Frisco and the C. & E. I. went into the hands of a receiver and the fuel contract was canceled. Later it was put on the Belt Railway of Chicago, and general domestic steam coal.

This mine here has been in operation for seven years and it was constructed to produce a maximum of about 4,000 tons of coal. The most it has been able to produce up to the present time has been 2,760 tons. It hoists at the rate of 3,500 tons a day quite regularly, which means its equipment could put on cars 3,500 tons a day. We have the working place; we have the equipment; we lack the markets and the service, and temporarily we lack the men. There is no doubt but what we could draw additional loaders or piece workers and the necessary company men to produce 3,500 tons. I think there is a surplus of miners in Illinois during the times when the mines are shut down. Normally, I think not, if all the mines were operating.

Under the keen competition which the coal industry is in now, the larger operations are, of course, the cheaper operations. If a mine can be designed to produce 4,000 tons per day its coal will be cheaper, as a general proposition, than a small operation. They are going more and more to the big operations. In the last year I recall two mines produced 1,000,000 tons per annum, which was something unheard of, or unthought of ten years ago. There are 3 competitors in the Franklin county district that have a capacity of 3,000,000 tons alone, per annum. A large mine that can get out a large tonnage and has a flexibility of its railroad service or an outlet to various markets, is the mine that is going to live. I am generally familiar with the Saline County district. The Big Creek Coal Company has an operation which is a good producer. Likewise the Harrisburg Colliery Co.

[fol. 319] The Ogara properties were opened up about 1901, and consolidated about 1904 or 1905. The mines shown there of the Coal Company are, as an average, I should say, 18 to 20 years old. Consolidations of old mines were put together in 1904 by Mr. T. J. Ogara.

"Q. Is there any one of those mines that has an expected life of over two or three years?

"A. Yes." (Tes. 296-302.)

"By Mr. Cardy:

"Q. Mr. Fenton, your Exhibit No. 16, that shows a relative running time of mines on the Big Four in Saline County versus the J. K. Dering Coal Company Mine No. 2. Briefly state upon what you base the shortage in running time or loss of running time. What was it due to?

"A. In this period of car shortage it was due to the lack of cars in our case, and in their case. Their running time was better than ours by relatively 20%. This property, as has been said by various witnesses here, is located peculiarly to its car supply. It is located out on the end of the Illinois Central, and its service on the Illinois Central is not as good as could be expected or as is, I will say on the main line of the Illinois Central, or closer to the Illinois Central. It is at a disadvantage in receiving its equipment.

"I have been at the mine on numerous occasions when we would have cars to start in the morning, sufficient cars to run for three or four hours with a definite promise that equipment was on the way to us, and would reach us in time to keep us going. We have perhaps waited half an hour, three-quarters of an hour, beyond the time, when we had to cease hoisting, for those cars and they would arrive after we had blown off perhaps two or three hours afterward."

Concerning my knowledge of the service or the condition of the track between Duquoin and Eldorado over which the empties and the loads travel: The track is, of [fol. 320] course, not of the quality such as it is on the main line. From Eldorado to Benton, generally, the road has curves. It has grades that they do not have, at least, on the main line of the Big Four, and the C. & E. I. and the Illinois Central. Comparing the service that is rendered by the Illinois Central in getting the empties from Duquoin to the mine located at Eldorado as compared with the transportation service of the Big Four in getting the empties from Harrisburg to the mines adjacent to this Dering Mine No. 2, I will demonstrate it in this way. The flow of empties is principally from Chicago in both cases. Empty coal car trains are enroute, let us say, during the day. The railroads take a census of their mines and compile their orders at 4 o'clock or thereabouts. They then figure about what

mines they can operate generally around about 6 o'clock; perhaps a little bit later. They know about how many hours away their empty trains are and they can tell with reasonable accuracy about how they are going to place those empties. In the case of the Big Four Railroad those empty coal cars are taken to Harrisburg. If the south end of the field is going to work, let us say, that by 6 or 7 or 8 o'clock at night the mines are plucked; maybe later than that, according to the movement of the empties. In the case of the Illinois Central the cars are distributed at Duquoin and are put into the mines in that district. Perhaps the mine up at Duquoin will have its cars or the mine in that district will have its cars in the mine while ours are still in transit and may be in transit all night. They may reach us in time to work and they may not. I feel confident from my own knowledge of the coal business that if that mine were located where in times of good market we could get cars and knew we could get cars and could operate reasonably well our production would be much larger than it is now. (Tes. 305-308.)

In other words, the fact that the mine has not at present reached its potential capacity is due to inadequate railroad [fol. 321] service and lack of markets. With joint service on the Big Four, I think it would materially increase the markets.

I have prepared an exhibit showing the increase or the decrease in the cost of producing coal at this particular mine had the mine had substantially the same running time as other mines located on the Big Four and within a very short distance of this mine. It consists of 5 pages, and covers the period from October, 1922, to March 1, 1923.

(The papers referred to were marked for identification Complainant's Exhibit No. 18.)

Exhibit 16 hooks up with this Exhibit No. 18. On this exhibit, as an example, the first page sets out the costs, per books of this No. 2 mine for the month of October, 1922. From that it will be seen, assuming this mine would have had 74.4% running time, which is the running time worked out by Exhibit No. 16, the production would have been greater and the cost would have been 67 cents less per ton. The purpose of this exhibit is to show the effect on coal

costs of interrupted operations. The mines I am comparing this with are joint mines on the Big Four, the L. & N., and the I. C. As to the advantage a joint mine has over a local mine located as this mine is: Part of my experience was as the order dispatcher and car distributor for the T. C. Keller receivership. We had business in Montgomery County that would go to Chicago either Big Four or C. & E. I. When there was a plentiful car supply on the Big Four and we had business that could move either way we would operate our mines or vice versa, if the car supply on the C. & E. I., let us say, was good and was not good on the Big Four we would move this joint business to Chicago over the C. & E. I. As a general proposition in times of car shortage we would confine all of our tonnage to one line, depending upon which line had the best car supply. That is what we could do. As a technical proposition the advantage enjoyed by a joint mine is that it can assert its [fol. 322] rating against the road of good car supply. In addition to that, it can ship its coal. We have made numerous car supply studies and running time studies, and I have yet to find where a joint mine has not the advantage, as a practical proposition, over a local mine. It has a better operating time, which I will say means a better car supply. Technically it is true that it has a better car supply than the local mine on the road with the lowest percentage of car supply, and also has a lower car supply than the local mine that has the best car supply. I would like to say, however, the joint mine, for some reason, has the breaks when it comes to distributing cars. In view of our past running time and production record, I would say it is absolutely necessary to have service from the Big Four as to cars and markets if this mine is to produce the tonnage for which it is designed.

(The papers marked for identification Complainant's Exhibit No. 18 were received in evidence.) (Tes. 308-313.)

Cross-examination:

If you will refer to Exhibit No. 14 for the month of October, you will find on the 17th of October, on the 20th of October, the 26th of October, and the 30th of October, we failed to operate our mine because the cars did not arrive or we were promised cars that never did get there. I can-

not specifically say which it was. I know it was either one or the other, because I watched this car supply in times of car shortage every day. I have in numerous instances been in there myself. I was not there on the dates in October I spoke of; I do not personally know that that occurred at all. The exhibit from which I undertake to show it did occur was prepared by me. I did not write the original report containing the data from which I prepared it. The original report showed the cause of our failure to operate. I haven't the original report filed with me. I have classi-
[fol. 323] fied exactly according to the report.

"Q. You have classified according to the report, but you have not classified according to the cause, showing the cause of your failure to operate.

"A. As distinguished between failure to operate, car supply failure, and the failure to arrive, that I spoke of.

"Q. Failure to arrive?

"A. You are correct.

"Q. As a matter of fact, you cannot tell from the reports you have made here nor you do not know as a matter of personal knowledge of any cases where failure to operate was due to the failure of your cars to arrive as distinguished from a failure to give you a car supply?

"A. You want to pin me to an exact date when I was at Eldorado, which I cannot remember."

I cannot mention the date, but I will tell you an exact occasion. We had 20 cars in our mine, and we were informed by the Illinois Central that we would have sufficient cars to last us out a day, and we operated two or three hours and waited, and finally closed down at noon. And the empties came through at 2 o'clock, a very beautiful string of empties that we would have liked to have had that day. That was in the fall of 1922, but the exact date I cannot fix. The cars didn't get through because the Illinois Central said they were held up somewhere, and they did not get to us according to what we were promised. I do not know what held them up; I do not know the cause. Between Eldorado and Benton on that road, they have a passenger train at 5 o'clock in the morning; one at 11 o'clock in the morning; a train at 2.30 p. m., and a train at about 9.30 at night. Only four passenger trains. They have a local freight train leaving Eldorado about 9 o'clock in

the morning and it returns in the evening about 6 o'clock. They would have an extra to bring us empties and to take [fol. 324] out coal. Just one a day is the general practice. The distance from Eldorado to Benton is about 30 miles. Southeast of Thompsonville, in Franklin County—from that point to Eldorado there is a mine at Logan, and at Galacia, and one at Eldorado; our No. 2. That is all the mines there are on that branch. I should say there are 25 or 30 mines in the neighborhood of Benton and between Benton and Duquoin on the Illinois Central and on spurs running off this same branch of the Illinois Central that are served from the classification yards at Duquoin. I cannot say how many trains they run from Logan or say Thompsonville, to Duquoin in a day. The Illinois Central roadbed between Duquoin and Thompsonville—I should say from Benton to Eldorado—the roadbed itself and the grades are at their worst. That is pretty rough down in there, and very winding. I cannot say if the grades were all established on that branch at the same time. There has been no reconstruction of that branch of the road since I have been in that district. I have been in that district 7 or 8 years. (Tes. 313-318.)

From an examination of some deeds I will agree with you that the old Belleville & Eldorado Railroad was built there about 50 years ago, and there has never been any change in it, and it is the same railroad now that it has always been. There is a difference, other than distance, as compared with mines on the road west of Benton to Duquoin, that we occupy. They have the power up there to spot those cars on those mine leads to those mines in Benton. How many switch engines, I could not tell you. And they have got one extra that travels extra 30 miles down to our place todeliver our cars to us. That is a difference in motive power I am talking about. And they have better service. Outside of that difference, then, our disadvantage lies in distance.

[fol. 325] In making up these Honnold sketches, I did not make any investigation to ascertain how many of the mines in Saline County were assigned to produce railroad coal. I included all of them in my statement. If all of them were on the assigned car basis their running time would probably be 100%, and if 50% of them were on the assigned time it would only be proportionately reduced. If it is a fact that

those mines were assigned, some of them, some of the largest ones, that would not, in my opinion, entirely render my figures inaccurate. If those mines by reason of their connection on the Big Four have available to them fuel coal business, aren't we entitled to fuel coal business if we are located adjacent to the Big Four Railroad? I haven't the information for the year here; it runs from August to December, 1923. I did not cover it for the entire year because I did not see that the entire year's figures would be material. There was not, let us say, in some of those months a loss of time by reason of no markets. I cannot say that I looked over the entire year's period. I think in the forepart of 1923 or up until this period the loss on account of no market was not of any great extent. I cannot recall that all the mines except those that had regular contracts to fill for manufacturing industries and those that were assigned to furnish railroad coal or were actually engaged in furnishing railroad coal were in the same condition in that territory during that time; I am trying to recall the whole year of 1923. There was in the forepart of 1923 a car shortage about March 31. That car shortage was reduced. Then, after April 1, 1923, we ran into a period of no market and that prevailed to a more or less extent until December, 1923. I cannot say that the Dering Coal Company has any big consumers of coal that it has contracts with to furnish coal; I am not in touch with the sales department. I think they sell some railroad coal to the Grand Trunk Railroad. I cannot say if they have railroad coal contracts.

[fol. 325½] It is our theory that we should compare our running with the mines on the Big Four. As to reason why in making that comparison we did not analyze the facts and put each company on the same basis or make a comparison with companies that are doing a business that is comparable with the business of the Dering Coal Company: That leads then to the question of markets, which we think we are entitled to. If there is railroad business to be had through the Big Four, I see no reason why we shouldn't have it. Nobody that I know of is doing anything to prevent us from getting as many railroad markets as we want, except we may not be able to make railroad contracts by reason of being unable to deliver from our fields over the right kind of road. (Tes. 319-325.)

Our market might be restricted because we are on the Il-

linois Central in Illinois. I said we were restricted in Illinois because we were on the Illinois Central. I cannot say how many miles of railroad of the Big Four there are in Illinois; there would be more on the Illinois Central than the Big Four. It might be correct that it is about 500 as compared with 1,600 on the Illinois Central. Our local market on the Illinois Central is restricted. There is a mining group about Duquoin which is closer to Chicago, in the northern part of the state, than we are. There is a mining group up here in the central part of the State. That has access to the Illinois Central local market into Chicago. On the north there is a mining group in northern Illinois. That condition does not prevail on the Big Four. There are no mines that I know of north of that Norris City mine on the Big Four, until you reach Westville. From Danville to Cairo on the Big Four, the local markets on the Big Four would be small, comparatively. It is correct that on the main line of the Big Four there are mines in the Hillsboro-Nokomis district and other mines farther down in Madison County, and there are mines at East St. Louis, and that ter- [fol. 326] ritory cannot be invaded by anybody in southern Illinois. That is absolutely true. They have a substantial mining district in Indiana, but that mining district has a relatively short life, right now. I am talking about the future.

"Q. Just like you were when you were talking about the Ogara being exhausted. Isn't it true that mining district extends over into Illinois and that the Danville district and the coal mining in the Peoria district branch of the Illinois Central on the P. & E. Branch—I mean of the Big Four, and at Bloomington—that the coal is all supplied there from that source?

"A. I do not know that they supply all the coal in Indiana to Indiana, no, sir." (Tes. 325-328.)

Mr. C. B. Ackerman was called as a witness on behalf of complainant and, being first duly sworn, testified as follows:

Direct examination:

My name is C. B. Ackerman. I have had approximately 26 years' railroad experience. Most of my duties have had

to do with freight rates and traffic matters. My present position is traffic assistant to the Director General, United States Railroad Administration. I have prepared a statement of the present rates on bituminous coal from Eldorado, Ill., to representative points in Indiana, Illinois, and Michigan. I have also prepared a statement showing the rates from Eldorado via the Illinois Central. The statement contains tariff references. I submit the papers mentioned.

(The papers mentioned were received in evidence and marked Complainant's Exhibits No. 19 and No. 20.)

Cross-examination:

With one exception, I believe these comparisons are between the same points. I think in one case there is one [fol. 327] town shown on one exhibit and not on the other. I think that is Lafayette, Ind, and the reason I did not put it on in connection with the Illinois Central was because I could not locate any joint through rates and I did not have time to work out the combination. They are joint through rates from points on the Big Four, that is, from Eldorado on the Big Four to the destinations I have shown on the exhibit off the Big Four. There are not joint through rates from the Illinois Central to the same stations. They are made on combinations. The last 3 stations shown on the exhibit are made on combinations and the routing is shown. I do not know that I am qualified to answer for the Illinois Central as to why there should not be joint through rates on that road. I should judge if the Illinois Central wants to participate [participate] in that traffic they would want to publish through rates. The route is open. The joint rates are lower than the combination. It is not just a mode of publishing the rate; the joint rates are lower than the combination. It is just a mode of publishing the rates; the route is open. Under the present rate structure I do not think the Illinois Central would care to ship to these points. The physical condition is all right. These points were selected at random as representative of destinations in that territory, regardless of the destination lines. I do not know what coal has been shipped from that territory to any of these places. To many of these places the

Big Four would not get all the revenue; it would naturally divide between the two carriers. It is just speculation to say that it is a fact that apparently there has not been a sufficient amount of revenue to be derived from that territory to justify the publication of the through rates on the Illinois Central. I cannot say why the Illinois Central did not publish joint through rates. It may have been a question of divisions.

[fol. 328] Redirect examination:

Possibly it might be because the shippers and producers of coal on the Illinois Central could not get in there for some reason.

Recross-examination:

If the Big Four see fit to publish joint through rates it seems to me they must have figured they were going to get some business into that territory. (Tes. 329-333.)

Mr. Clardy offered in evidence a copy of the charter of the J. K. Ewing Coal Company.

(The paper referred to was received in evidence and marked Complainant's Exhibit No. 21.)

Mr. Clardy offered in evidence as Complainant's Exhibit 22 copy of original petition filed with the Illinois Commerce Commission seeking the right to cross the Illinois Central, the Traction line and the highways in question.

(The papers referred to were received in evidence and marked Complainant's Exhibit No. 22.) (Tes. 334-335.)

The transcript of the record in the hearing before the Illinois Commerce Commission and exhibits thereto filed, were offered in evidence by Mr. Gillespie, and marked Defendant's Exhibit No. 23. (Tes. 329-339.)

Mr. Gillespie: I offer a certified copy of the file mark, showing the date the record on appeal was filed in this case from the Illinois Commission in the Circuit Court of Saline County, certified under the hand and seal of the Clerk of the Circuit Court, and a certified copy of the following: (1) Notice of appeal and affidavit proving service thereof; (2) Notice of application for stay order and proof of serv-

ice on Julius Johnson, Secretary of the Illinois Commerce Commission; (3) motion for stay order; (4) order of court showing proof of service of notice of application for stay [fol. 329] order; (5) temporary stay order entered by agreement; (6) order of continuance; (7) order showing trial and submission of cause; (8) order showing findings of court and affirmance of the orders of the Illinois Commerce Commission of the date of May 3 and May 8, 1923; (9) Order granting permanent stay order, and approval of stay order bond; (10) order granting appeal fixing appeal bond authorizing clerk to approve same and fixing time within which bill of exceptions may be presented; (11) copy of stay order bond with approval thereof; (12) copy of appeal bond. Certified by and under the hand and seal of Roy E. Holmes, Clerk of the Circuit Court of Saline County.

(The papers referred to were received in evidence as Defendant's Exhibit No. 24.)

Mr. Gillespie: I offer as Exhibit No. 25 a copy of the order of the Illinois Commerce Commission in original order No. 12819, entered on December 14, 1922, granting authority to the Illinois Central to build, maintain and operate the proposed track.

(This was received in evidence as Defendant's Exhibit 25.)

I offer as Exhibit No. 26, a copy of a map gotten out by the University of Illinois, showing location of all the coal mines in the State of Illinois and the railroads on which they are located.

(This was received in evidence as Defendant's Exhibit 26.)

I offer as Exhibit 27, copy of brief filed by appellant in case of The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Illinois Commerce Commission ex rel. Deering Coal Co., et al., appealed from the Illinois Commission to the Circuit Court of Saline County.

(This was received in evidence as Defendant's Exhibit 27.) (Tr. 329-343.)

J. R. PEXTON was recalled to the stand and testified:

I have prepared a statement showing the average daily [fol. 330] tonnage of the Dering Coal Company Mine No. 2 during the period March 26, 1921, to March 31, 1922, consisting of two pages.

(This was marked Exhibit No. 28 for identification.)

The information shown on that exhibit comes from a weekly summation of our production records, which is prepared by me, and shows the progress of the mine, either up or down. I want to explain, for instance, the week ending April 2, 1921. The 168 is the average number of loaders, which means piece workers or tonnage men. The 1,871 is the average daily tonnage which is produced or was produced in that week. That is to say, if we work 2 days this showing here April 2 would be the average of those 2 days, etc. This exhibit shows that starting in in April of 1921 our average daily capacity ranged between 1,800 and 1,900 tons per day. It dropped September to 15. My effort there was to just take up the thing generally, that is April, May and June. The larger of the tonnage there is more nearly 18 than 19. There are averages of 16, I see, but the general swing is 18 and 19 hundred tons. I was not giving the range. I just want to point out the general showing of the exhibit. It dropped September, 1,500 to 1,600 and 1,700 tons, and then in the fore part of 1922 you will see it ranges a little over 2,000 tons, to 2,184 tons. That is the highest in that period. The purpose of this exhibit is to perhaps more clearly show our set up in Exhibit No. 17. We have a mine there with a capacity of 3,500 tons per day, with a maximum of 4,000 tons per day. The thought in preparing Exhibit No. 17 and this exhibit is to show that if our markets were enlarged, if we had service to markets, we would have ample room for production to serve any additional markets, and that specific Exhibit No. 17 shows a production of 362,000 tons, whereas, if we were producing around 2,500 tons per day it would be a total of 700,000 tons per annum. This also sets out, in my opinion, and I am referring to Exhibit 28, the other matter which I mentioned with respect to the production history of this mine.

[fol. 331] A mine once such as coal ought to build itself up and reach its designed capacity, or thereabouts in a much

shorter time than this property. It will be seen here that this mine produces sometimes a half tonnage, we will say, and then again drops below that, and then again, due to conditions, just what the exhibit does not disclose there, it increases its average daily tonnage to above the range for the year. I would attribute that fluctuation to the fact that we go out and get a piece of business in our present market which would give us a fair running time and we get to working steadily. We get our men there on the job and we produce coal. This would be 9 months of 1921 and 3 months of 1922. My memory of 1921 is this: We had the great strike of 1919, so-called. Then we had the award of April 1, 1920. Then we had the day men's strike, which started in southern Illinois, which cut down production about the middle of July, and that we were during perhaps the last 3 months of 1921 and the fore part of 1922 doing a reasonably good business. I don't know what the total production in the United States was during 1921. It is quite true that in anticipation of the coal strike beginning April 1, the first 3 months of 1922 would be months of heavy loading. That is exactly the reason why the 3 months of 1922 were so much heavier than the other months when there was practically no demand for coal—during 1921. Our daily tonnage may be due to the fact that there are no markets or other conditions during that period.

I think I testified 2,760 tons as the maximum production of this mine up to the present time. This mine produces at the rate of 3,500 tons or thereabouts, practically every day, taking the net hoisting time, thus showing that its equipment is capable of handling that tonnage. (Tr. 346-351.)

I cannot say specifically if we had practically 100% car supply in this whole period of 1921 on the Illinois Central, but if it was a poor year for markets we probably had a [fol. 332] 100% car supply. It is true that our production was curtailed because we could not find a market via the only outlet we had, the Illinois Central. At least, let me say I feel if we had a broader range to get out and get business in we could move more tonnage, much more tonnage than we have as a general average. The purpose of this exhibit is to show the lack of progress in the tonnage and the fluctuation in tonnage from period to period.

"Q. Have you made any computation as to what revenue the Big Four would probably get on coal that would be delivered over this connection based upon your knowledge; if we had the connection, the number of carloads of coal per day that would be delivered to the Big Four?

"A. In any joint mines where I have had any experience, the tonnage moved relatively half and half. But assuming that it would not, and assuming that the J. K. Dering Coal Company could ship 20 cars per day, that would be 1,000 tons per day, or 200,000 tons per annum. The revenue to the Big Four would be, assuming a Chicago freight rate, $1.95 per ton, which figures $390,000 per annum gross revenue from the business."

Assuming that that would move to destinations other than Chicago and the division was only one-half of that freight rate, the Big Four would get one-half of $1.95, or 97½ cents gross revenue per ton, or $195,000 per annum. I am assuming they only get half of the Chicago rate. My understanding is that the Big Four does not have its rails to Chicago, so it would not get all the revenue unless they have a trackage agreement or something lik that, which I am not familiar with. We halved it. But I think they are perhaps half the distance to Chicago. The $390,000 would not apply if there is a division of the rate with somebody else, and if there is not a trackage agreement of some kind or operating agreement of some kind from the last point on the Big Four to Chicago.

(The exhibit previously marked for identification No. 28 was received in evidence as Complainants' Exhibit 28.) (Tes. 252-255.)

[fol. 233] Cross-examination:

Mr. Dering is President of the Dering Coal Company; Mr. Pauley is Vice President; Mr. Roynon is a vice president; Mr. Ford is Treasurer; Mr. D. F. Higgins is Assistant Treasurer. Mr. Roynon is also Secretary. They have 3 mines; two located in the Clinton, Ind., district, and one located at Hildreads, in Saline County. The Clinton mines are on the rails of the C. & E. I. Last year we shipped a little coal, a carload or two, to Michigan. We shipped it from one Illinois mine. I do not know if that came from

Indiana or Illinois. I want to explain that by the fact that I thought you were referring to this exhibit here, which is based solely upon Illinois tonnage. What went from Indiana I know nothing about. I cannot say if the coal referred to was shipped from Indiana. D. L. Haskins is superintendent of our mine at Eldorado. Mr. John Edwards is the mine manager. We have 2 assistant mine managers, and a top foreman; an electrician, a chief clerk and 2 mining engineers. Mr. Edwards has been with us about 5 years; Mr. Haskins about 6, and Mr. Lindsay, an engineer, about 7 years. Mr. Thomas, the Chief Clerk, has been with us 6 years. We have more than one report daily. We have a little daily production report, which is made daily by the billing clerk who bills out the coal. The manifest report of coal billed and shipped is also made out daily by the billing clerk. The cost statement is made up daily by the payroll clerk, subject to the supervision of Mr. Thomas, the Chief Clerk, who is responsible for it. The Chief Clerk does not trans-it all this to me; he probably does not see the reports as they are made up daily. I mentioned him to say that he is responsible. Our Chief Clerk is responsible for the activities of our employes down there. The production report shows the number of the men; the date; the hours worked; the number of loaders employed; the loaders working; the number of loaders idle; the number of day men working; the number of machine men working; [fol. 334] the average coal pulled per motor; the average weight of the pit car; the average hoist of the day; the weather; the indication as to whether they will work the next day or not; the causes of idleness and delay and the number of hours and minutes of idleness and delay; the car report, which starts out with cars ordered, cars on hand in the morning, cars received, total cars, cars loaded, empty cars on hand, coal cars billed and no bills on hand. Mr. C. T. Barnes makes that report. He is living today. The original reports are in Chicago. I have not copies of them with me; I wish I had. I know I had them before I started here. I know for the past 2 years I had them. I would not count too heavily on Mr. Pauley knowing all that time we had them; he perhaps knows of the report. He doesn't know what the daily reports contain; not from doing it. He knows from what reports I make to him, you bet he

does. I make the summation of the operating report made out at the nine and send it to him and talk it over with him. He knows the form of the report. He knows what is a complete report and what is a deficient report. He knows if that report is made as I have indicated here that an examination of those reports will show the cause of every delay occurring at that mine. For whatever it may be worth I will say those reports if they were brought here would require quite a large trunk—one for every day. We could have brought them for typical periods of 5 or 6 months, or 10 months, or a year and it would not have taken a freight train to bring them; I thought you referred to bringing all of them. (Tes. 355-361.)

I know what is contained in these reports that are made to the Hounold Coal Bureau daily by our mine. They show first the production, whether any is stored on the ground, and the total production. They show then the hours and the minutes lost, the number of men working and the man hours lost. There are some little blocks that set out the mine disability, railroad cars, and I think their delays. [fol. 335] They also show the car situation. The Hounold Report is designed to be very complete and when you have a copy of it before you for a day you have a complete picture of every operation of that mine, every delay in the mine, every incident that occurs in the mine; at the bottom of it, if there is anything extraordinary there is a place for remarks regarding that. It is designed to be very complete; I think it covers everything you can think of.

This 9 months' showing here would indicate in 1921 the production was very low. It was not only low on our mine, but, relatively, on all the mines in Illinois; there seems to have been a slow market season there. We take yearly contracts for the delivery of coal in the future. I am not familiar with the sales department to tell you who are some of our principal customers. We sell No. 4 coal to the U. S. Steel Company from over in Indiana; I never heard we sold them any from over in Illinois. As to railroad contracts, we have, I think, some Grand Trunk business at the present time; no others that I know of. I do not know what our sales policy is with reference to taking contracts for the delivery of railroad coal. We have had some Grand Trunk business for the last 2 or 3 years. That

is to say, nor for the entire year, however; there would be some of it and then we would not ship for some time. It is my memory we have not had an annual contract running for the year to deliver to the Grand Trunk or any other railroad. We have not had any such contract with the packers either, that I know of. I know that coal mines that are able to obtain such contracts are able to run very much more of the time than we are where we have to go out and hunt our markets. It is true that such mines as that usually run 100% to fill their contracts, if their markets are assured them through railroad contracts or through, let us say cost plus contracts, to large users. (Tes. 361-364.)

[fol. 336] It is true there is a variance in the amount of coal produced even by those companies having such contracts from month to month during the year. One month they will deliver a great deal more coal. It is the bad custom in the coal business that a man can shut off his shipments, and that would be relatively true. They take a minimum delivery every month and then they take—their mine contracts, to furnish them all they demand up to a certain maximum. As a usual thing coal contracts are very liberally construed in favor of the chap receiving the coal. Certain minimum and maximum tonnages are mentioned, it is true. The buyer of the coal can notify the producer that his steam shovel is broken and his underground storage is flooded or frozen, and he gets his shipments stopped. That does not mean, however, that the mines you refer to as a general practice in any experience I have, shut down. There is an elasticity in the amount of production that they deliver to their customer within the maximum and the minimum. I would not say that it is true that the maximum is somewhere near the potential production of the mine as a usual thing, for the reason that the coal business, as a general proposition, is not given by the large users all to one property. They are afraid to do that on account of the labor situation, the car supply, and mine disabilities. They farm out their tonnages to various producers. I do not know of any coal operation that could keep a supply of labor. The labor that is responsible for the difference in production in a mine is the piece workers or the machine loaders; the chaps that load the coal. You shut down your mine or you let it drop be-

low that which somebody else is operating and those fellows are going to take their tools out of your mine and go to the man that runs more than you do. That is the labor turn-over we have heard so much about in the coal fields. If your statement has to do with, let us say, keeping day men and keeping the mine up so that the maximum capacity can be produced—the maximum required by their con- [fol. 337] tracts for future delivery—then my statement will agree; then the maximum under which they are required, that would perhaps be good business. It is true that most of these mines that have contracts keep a more steady supply of labor than the mines that do not have these contracts for future delivery for the reason that they can more certainly rely on work from day to day. That is true throughout the year. It is true that they attempt all the time to keep a maximum to fill their contracts, and that whenever their contract customers are not taking their output they go into the market and sell their surplus. If a mine was on railroad coal, and for some reason that tonnage was shut off I do not see but what the coal operator would go out and try to place the tonnage elsewhere. Let me explain those contracts. They call for a certain number of tons per annum. If, with the consent of the operator, the contracts are cut off, owing to some good reason, then he will sell his coal on the open market and when his railroad comes back in again and wants tonnage he will go ahead and divert his coal to that chap. Coming to that point: If a coal operator is on assigned cars and his railroad tonnage is cut off I would assume, of course, and do assume in my statement, his assigned cars are cut off from him, and he then goes on the commercial business. Taking a coal operator that is on assigned cars for a period of say 30 days, and for some reason the railroads then do not take coal for 2 days: I cannot see why it would not be the policy of that coal operator for those two days to sell coal commercially. I do not see the advisability there. I do not mean to say that he would use his assigned car rights to ship out commercial coal. I am not familiar with the car supply laws, the recent changes.

The Steel Company has a large mine at Benton. They have a lot of coal down there; just how much I do not know whether they know or not. I know just a little about the uses the Southern Illinois Railway & Power Company have

[fol. 338] for coal through the fact that the mine that was delivering them coal was shut down at one time on account of quality. They get their coal down the line from some of the smaller operations down there. Just the name of the companies I cannot recall. They get their coal on contract. (Tes. 364-369.)

I know the Peabody Coal Company; they have from 25 to 30 mines, let us say, in the state of Illinois. Most of them are in the central Illinois district. Their mines in the Kincaid produce coal for the Commonwealth Edison Company, and they operate at least with No. 20 of theirs on the Big Four at Eldorado. For coal for the Kincaid plant of the Central Public Service Company, they had extensive contracts. I do not know how many utilities belong to the Central Public Service Company. I do not know how many electric companies, water companies, gas companies. I never heard that number mentioned as about 200. The McKinley properties in Illinois have some mines down there about Worden. (Tes. 369-371.)

I do not know specifically that they buy extensively in the market too, but judging from the capacity of those mines at Worden, I would say so. (371.)

Some contractors and sub-contractors built the track in question here. The Illinois Central had charge of the construction of that track; their engineer laid it out and supervised the work. The Illinois Central knows all about it through their engineers. Mr. A. A. Logue, the Illinois Central engineer that did the work, is not dead. I know Mr. Gardner, who was there and kept the time and supervised this work all the way through. I have not heard that he is deceased. It is pretty hard to compute the number of days I spend at this Mine No. 2, Saline County, Ill. I go down there and stay for perhaps a week. Then I may not be there for a week or so. Perhaps I am assigned to some work that takes me clear out of the district, and I do not get down there for quite a period. I cannot say defi-[fol. 339] nitely as an average. When I am down there, I check up the cost statements, work with the superintendent as to the production program; check up the cash; look after the real estate records and take an inventory, perhaps. I can do almost anything. That is, around the mine; just whatever is required. I am responsible for the mine offi-

cers; for the class of work they turn out and for their honesty. I do not make any records when I am down there myself, other than the result of my investigation. What I do is checking up and keeping in touch with the mine officers. In my office in Chicago my first duties at all times are to watch the costs and the production and the comparative production. If the car supply situation is bad I do all I can to secure cars; keep in touch with the car distributors. When I am absent from the Chicago office, the work is left about where it is. There is nothing to do, relatively speaking, at the mine when I am in the Chicago office. During the last 3 or 4 months the market situation has not been good, generally, I should say. In fact, the running time would roundly be somewhere about 40% taking the whole thing by and large and through the middle, I believe. I am not quite sure. That is due principally to the fact that there is no market. (Tes. 373-377.)

It is so that they are mining around 12,000,000 tons a week, which is probably the largest on record. In fact, I have a Geological Survey report here that will show that. But at the same time the production in Illinois is low in the same report—not low—is lowered as shown in the same report, by the lack of markets. I don't recall if Illinois in the last month ran short of cars. Generally they might have, but I do not recall it. I think the Government is on record, and almost everybody else that knows about the coal game, will agree that production is perhaps 40%—that is, capacity is 40% greater than is necessary to produce. I hear that it is generally the case that practically 25% of the mines in Illinois are hanging by an eyebrow at the present time on account of the overproduction and [fol. 340] the crowded conditions with respect to the industry in that State. That there are mining companies which would perhaps be in the hands of receivers tomorrow if the banks would be willing to let them go into the hands of the receivers. It is true that some of the biggest mines—for instance, the Old Ben—have been shut down. These mines rank very high on coal producing since their last amalgamation with other properties. The mines of the Old Ben are Old Ben No. 11, at Christopher; No. 8, served by the "Q."; C. & E. I.; I. C., M. P., No. 9, served by the "Q.," C. & E. I.; I. C.; Nos. 10-11, served by the "Q."; Nos.

12 and 14, served by the "Q." and I. C.; No. 15, served by the "Q.," I. C.; and C. & E. I.; No. 16, served by the "Q."; No. 17, served by the C. & E. I.; I. C.; and the Missouri Pacific; No. 18, served by the "Q."; I. C.; and C. & E. I.; No. 19, served by the "Q."; and No. 20, served by the "Q.," and the I. C. I cannot say just currently without refreshing my memory a little bit the Old Ben mines that are working and the running time of the ones working.

Referring to Exhibit No. 14, "Mine disability and other causes" means the potential time possible for operation. Mine disability on that report means a broken hoisting rope and perhaps closing down the mine or broken hoisting engine. We don't charge that to the Big Four in our running time here. On the next exhibit, No. 15, "Broken hoisting rope" was not charged to the Big Four. Under "Mine disability" the "broken hoisting rope" was all the disability during that period where we blew off. We charge up to our operating time any difference during the 8 hours where we do not blow off, in this exhibit.

"Q. Do you tell this Commission the only other causes in this whole period were the election; other causes for interruption of your business?

"A. That is the only interruption where we blew off."

I mean we blew the whistle and took the men out of the mine and do not work the full 8 hours by reason of mine [fol. 341] disability or agreeing that we would work only so many hours on account of the local election. Other delays or interference with our work which caused a variation in the hours are not stated in this exhibit; but I have said they are charged up to the time operated. They are not charged to the railroad. They are charged up to the time the mine operated. As an illustration: Let us look at October, 1922, say the second of October there, 8 hours. During that day we might have a screen break down which involved a delay of 30 minutes. As a general proposition I will say if a coal mine can get away with a loss of running time of 10% by reason of changing screens, broken screens, and various and miscellaneous delays chargeable to its own account, it is perhaps making an average showing. Taking this summary at the bottom of the first page for October: I show our total tons produced and the average per hour. We

take our total and number of hours actually operated. I just stated that may be for 30 minutes we would not operate. The average per hour here is based upon the total of the time operated column. And we get 229. I have stated to you and have said on the stand here that we operate at the rate of 3,500 tons quite often. If you will take out of these 8 hours operated here the time lost by reason of screen delays and various other matters this average per hour will be perhaps 450 tons per hour. As to why I used 79½ as my divisor: That is a slight error in the exhibit. I will have to divide that to see if that is not perhaps a mis-copy. I should have used 78½. Preparing this exhibit it follows the fashion of tabulations having to do with car supply. A railroad is not responsible for mine disabilities. If a mine blows off by reason of its own mine disability it charges that disability to itself. The railroad is not responsible for it. I have charged that to ourselves in this exhibit. I have included it in the 8 hours or in the 7 hours as the case may be. I am sorry now I did not put it on the paper instead of just figuring it up so nobody could see it, because perhaps I could answer a lot of your [fol. 342] questions, but I will say to you truthfully and honestly that I thought as far as the railroad was concerned, and so far as car supply matters are concerned, if we absorb 8 hours here up to our own running time the railroad should not complain whether we operated full time or whether we were down a part of the time. The exhibit is correct, represents our running time for which the railroad might be responsible. This exhibit shows the number of hours the mine was down by reason of no cars. (Tes. 377-384.)

Referring to Exhibit No. 15, under heading "Potential operating time": The mines would operate every day except Sunday. That is the potential time every day except Sunday or recognized holidays on which the mine would not normally operate. The hours worked. "No market" means we either had no bills, that we could not move, or we did not have orders, but the chief cause here would be the fact that we would run up as much tonnage as we could produce and have no bills. I mean it is coal which we cannot consign. We could reasonably move more coal if we could reach other markets than the Illinois Central.

You have pointed out here in your cross examination of me and statements you have made a very highly competitive situation in Illinois. That really exists. I would like to say this mine should be permitted to have full leeway to exercise its rights as to competition in Illinois and any other markets. We have not closed down our mine. If we had the Big Four connection we would at least be on a par with the Old Ben Coal Company as to markets. I am quite sure our mine cost would permit us to compete and get probably a little more business than the Old Ben Company because of our more favorable costs, and the Old Ben mines are quite a bit older than ours, and I have an idea our costs will range lower than theirs in a keenly competitive market, and that is important. We could reasonably expect with a new mine as against a collection of older ones, to produce at a cheaper cost. I do not think there are any [fol. 343] faults in the mines of the Old Ben Company. Their coal is on a part [par] with ours. They have as good access to the markets as any coal mining company in Illinois. Their joint mines are situated on reasonably successful coal-carrying railroads. They have a very good organization. I would be pleased to say that the general superintendent of the Old Ben properties is regarded as one of the very best coal operators in the whole State. (Tes. 384-387.)

Redirect examination:

I have read the list of mines the Old Ben Company operates. It is quite a formidable list. I cannot say how many mines of the Old Ben Company have actually been closed down and the tonnage furnished by those mines that has shifted to the present operating mines. Here would be the situation of an operator having quite a few properties, which was our case with the Peabody Coal Company and with the Keller Coal Company. In time of no market and when coal moved rather slowly the habit was to close down the high cost properties and of course divert the tonnage that would normally come from those high cost properties to the low cost producers. With the number of mines the Old Ben has and with their flexibility of railroad service, I can readily see how they would perhaps close down their older mines and do the same thing as the Peabody and

Keller Companies did. The properties that are working among the Old Ben Company group ought to be working in excess of the average of our Mine No. 2, through reason of consolidation of tonnage from one to the other. That is my opinion based upon what has been done; what would reasonably happen. (Tes. 387-389.)

F. J. Blickensderfer was called as a witness on behalf of the defendant and, being first duly sworn, testified as follows:

Direct examination:

My name is F. J. Blickensderfer; I reside in Cincinnati [fol. 344] and am a civil engineer. I am acquainted with the territory at Harrisburg and Eldorado in Saline County, where mines are located on the Big Four and the Illinois Central in this sense: I have under my supervision and jurisdiction the drawings and records in the chief engineer's office of the Big Four, and by association with them I am familiar with what they show, but I would like to state that I have never been on the ground at this place you have been talking about. From the regular corporate records of the Big Four which are under my control and supervision, I have made a map showing the coal territory in Saline County, location of railroads with reference thereto, the prospective location of what is called the Edgewood cut-off of the Illinois Central. I had such a map made by men under me. That map is correctly made from the records previously existing in my office.

(The map referred to was received in evidence as Defendant's Exhibit No. 29.)

The line marked in dark red is the Big Four Railroad. Leading off from it, these small diamond-shaped spots indicate the location of mines. The red lines leading from the main tack to the diamond-shaped spots indicate the spur tracks leading over to the mines. The line running off there marked "Saline Valley" is the Saline Valley Branch on the Cairo Division. It is a part of the Big Four, and is a branch from Harrisburg in itself. This is what we call the main line of the Saline Valley, that por-

tion from Harrisburg to the mine marked "Harrisburg Coal Mining Company;" we speak of that as the main line. And that portion from the Harrisburg Coal Mining Company up to the Harco mine we speak of as the Harco Branch or Harco spur. To the best of my knowledge the entire length of the Saline Valley from the yard at Harrisburg out to the Harco mine is something like 8 or 9 miles, but I do not have that right in my mind. The distance from where it branches off from the other branch from the main line, north to Harco, is about 4 or 5 miles. The light red [fol. 345] line over on the east side of the map represents the L. & N. Railroad; it runs past Equality and then on southeast. The purple, or as we call it, the lavender line, represents the branch of the Illinois Central that goes from Eldorado west to Galatia, and then on and through. I understand it goes over to Duquoin. On this Eldorado branch of the Illinois Central from Eldorado to the line between Franklin and Saline Countries, the line between Franklin and Saline counties, is between 14 and 15 miles; the line between Franklin and Saline would be 14 or 15 miles west of Eldorado; rather, northwest of Eldorado. I do not know what other mines there are on the Illinois Central in Saline County than the Dering Mine No. 2 northwest of Eldorado. I would like to say we had no records as to what other mines there might be on this Illinois Central branch. I would like to say further you will notice we have shown in these red diamonds the location of our own mines, but not knowng what there was up here (indicating) we showed nothing. The object of the map was to bring out, if possible, in striking colors for the benefit of the Examiner, the relative position of these major features, assuming he perhaps might not be familiar with the conditions down there. This green line from Eldorado and Harrisburg and down to Carrier Mills is what is known as the Southern Illinois Railway and Power Company, the traction line. I had my men show a portion of the holdings of the Chicago and Harrisburg Coal Company and of the Ogara Coal Company so as to bring out their relation to these various roads. There are other coal holdings, a great many of them. I deliberately left them off because they would have put on so much detail that the Examiner would probably have seen nothing. It would not have been clear to him. This line which is shown in

dashed lavender color is the approximate location of this new cut-off. We have its exact location at a certain point over here in Williamson County, which point is not shown, and we have reports showing that it will come in this general direction (indicating). (Tes. 390-395.)

[fol. 346] I would like to state for the benefit of the Examiner I do not know whether it comes on the east side or west side of Thompsonville or just exactly where at Stone Park it is to cross our line, but I know this represents approximately the direction that line is to take. This is the proposed cut-off the Commission authorized the other day; it is what they call the Edgewood cut-off. We have its exact location here, or approximately over here (indicating) in Williamson County, because we had certain surveys made over here, and recently had our field men go out there and see where the crossing would be. It is approximately 15 or 16 miles from the place where that crossing occurs to Eldorado. It is my understanding from the reports that come into our office and interest that we took in it that this Edgewood cut-off was to be the main line railroad of Illinois Central from Chicago to New Orleans. As to whether this is the same Illinois Central Railroad that owns and operates the Eldorado Branch, I have always understood that in a general way the Illinois Central was in the whole thing. Further than that I would not like to say. (395-396.)

Cross-examination:

Referring to the map, and as to whether we have shown all of the mines located on the Illinois Central, the Big Four and the Louisville & Nashville at Eldorado: We have only shown those of which we had record in the office. I would like to state that when it comes to small details, as to just how many mines or just where they are exactly as shown here we are dependent entirely upon our records and the object of this map was not to show these small details, but to bring out the relative location of the Big Four, the Southern Illinois Railway & Power Company, and the Illinois Branch into Eldorado, and its new line. I don't know if the Illinois Central also serves Mine No. 11; we have maps showing that, but I did not go into that at all. Other witnesses are familiar with that. I think you are

correct and that Ogara Mines Nos. 11 and 8 are served by [fol. 347] the Illinois Central. I do not know if the Big Four Railroad also serves a mine over the tracks of the L. & N. near Equality, Ill. I do not know anything about the interchange of traffic between the Southern Illinois Railway & Power Company and the Big Four. I got my information as to the location of these mines from a drawing that was sent us about August, 1922, by our division engineers who are located—whose offices are at Mt. Carmel. They sent us a diagram showing where these mines were. As to whether or not they are all operating mines, and whether or not they are served by other companies, I have no knowledge. (Tes. 396-399.)

R. B. Stokeley was called as a witness on behalf of the defendant and, having been first duly sworn, testified as follows:

Direct examination:

My name is R. B. Stokeley. I am Assistant Division Engineer, located at Mt. Carmel, Ill. Eldorado and Harrisburg are in my jurisdiction. My duties as an assistant engineer are to make surveys of proposed tracks; plans for proposed tracks; plans and estimates for bridges and buildings; estimates for tracks; assist in maintaining the railroad in general. I have been in the service of the Big Four since 1911—thirteen years.

I spent 4 years in the Ohio Northern University in an engineering school. I graduated in June, 1910. I was employed by the Norfolk & Western Railroad in July, 1910, as an assistant on the engineering corps in the construction department of the N. & W. which at that time was reconstructing and doubletracking its main track between Kenova, W. Va., and Columbus, Ohio. At that time I was located at Chillicothe, Ohio. In 1911, I resigned from the Norfolk & Western Railroad and took a position with the Big Four, as an assistant on the engineering corps. In 1914, I was made assistant division engineer and held that position until the year 1916, when I was appointed track supervisor on the Cleveland Division of the Big Four, be-

[fol. 348] tween Bellefontaine and had charge of all the track between Bellefontaine, Ohio, and Winchester, Ind. In 1917, I was appointed acting division engineer on the Peoria & Eastern Railway Company on account of some extra work that was being taken care of on that railroad at that time, and after this extra work was completed I was transferred to Mt. Carmel, Ill., in 1919, as assistant engineer, and have been holding that position up to the present time. The Peoria & Eastern Railroad is a railroad operated from Peoria to Springfield, Ohio, and with a branch to Indianapolis, and is a line of the Big Four Railway, and has until very recently been operated by that company. At the time I was division engineer on that division we had charge of all the track between Peoria and Springfield, Ill., but I recently understand it has been taken out of the Big Four jurisdiction and is now operating under the P. & E.'s own management.

I have had my attention called to a track that has been in the course of construction at Eldorado or near Eldorado from the Dering Mine No. 2 to the neighborhood of Wasson Mine No. 1—between Wasson 1 and Ogara 1—on the Big Four between Harrisburg and Eldorado. I am acquainted with that situation and the distance. I have a drawing here showing the ditsance from Harrisburg to this proposed connection; it is 3.1 miles. From the proposed connection to Eldorado is 4.5 miles. From the depot of the Illinois Central to the connection—to Dering Mine No. 2—is 3.35 miles. The distance from the point of switch of the Illinois Central connection where it hooks up to our westbound main track is 2.9 miles. In other words, they run over a portion of our main track of the Illinois Central connection down to the Eldorado depot. The Big Four owns the switch, side and industry tracks at Eldorado. To my knowledge the Illinois Central has no depot or any side and inustry tracks in Eldorado. However, they use those tracks of the Big Four jointly with the Big Four under some lease arrangement. (Tes. 399 403.)

[fol. 349] My attention was first called to the connection in the vicinity of the Wasson mine, I think, about November, 1922. Previous to that time I had not gone over the ground where the track has since been built. Where the track is constructed at the present time, that is, up to our right of

way line, I walked over that ground and made a survey of the track. That is, I checked the tangents and curves. I did that on February 6, 1924. That was the first time I walked over this ground. I made the survey on February 6. I first went there and made an inspection of the conditions about November, 1923. I did not testify in this case before. In November, 1923, the contractor was grading for the proposed connection between the C., C., C. & St. L. Railway west right of way line and the right of way of the traction company. Practically all of the sub-grade had been completed. That is in order to put on the ballast and lay the track. None of the ballast had been put on any part of the road. None of the track had been built. That was about November, 1923. I made the survey of this situation and the conditions there on February 6, 1924. I have a blueprint showing what I did in the way of making a survey. That is a blueprint and profile; the same drawing. This was an original survey showing the conditions of the track and grade up to the C., C., C. & St. L. Railway Company's west right of way line as constructed now. There has been no change made there in the conditions within my knowledge since I made that survey. That blueprint correctly exhibits the situation as it now exists, other than the proposed connection. I have shown that proposed connection on the right of way, and the track is constructed up to our west right of way line. I made an examination of that track with reference to the dangers of operating it, and as to whether or not the crossings over the traction line and over the Illinois Central as planned, would be safe. Considering the track as a whole, and taking in all of the questions involved in this track construction I cannot say that [fol. 350] this track is, from an engineering standpoint, a safe track to operate. In the first place this track as constructed up to our west right of way line crosses the track of the S. I. R. & P. Company, which is shown in green on the blueprint, and also crosses the main track of the Illinois Central Railroad.

(The paper referred to was marked for identification Defendant's Exhibit No. 30.)

In addition to crossing the S. I. R. & P. Company, the electric line, and the Illinois Central Railway Company's main line, it crosses 3 highways. Now, it has been the prac-

tice of the State of Illinois, with us, the engineering department, and it has also been the practice of the Big Four Railroad, and I think I am safe in saying it is also the practice of all railroads in this country wherever it is possible to do so, to eliminate railroad crossings and grade crossings wherever it is possible; that is, where it does not involve too much expense, and for this reason, one reason, I cannot say this is a safe track to operate over because our reports and everything indicate that there have been quite a number of accidents due to highway grade crossings, and also railroad grade crossings. I do not mean the physical condition of the track is unsafe to operate over. I am looking at this one question from the standpoint of accidents. The distance between the crossing and frog located across the track of the S. I. R. & P. Company's electric line and the point of switch in our westbound main track is 2,360 feet. Considering that we handle a train containing 35 cars plus the length of the engine, that would be 1,560 feet. That is the length of that train including the cars and the engine. And this train is supposed to stop before crossing an interurban track 800 feet south of the crossing, which would make a distance of 2,360 feet. That is the 800 feet plus the length of the cars and the engine, which would mean that when a train approaches the mines, and it is supposed to stop 800 [fol. 351] feet south of the crossing, that there would be 60 feet of this train still located on the westbound main track, which would have a tendency to foul the main. That is, it could not come up and stop and still clear the main track. (Tes. 403-409.)

I made an observation of the manner in which the proposed track crosses the Illinois Central Railroad. The crossing frog is constructed at an angle of 14 degrees and 35 minutes. The crossing frog is on a tangent. That is, the point of curve is about 30 feet west of the central line of the crossing frog. The point of tangent, or end of the curve, is 1,070 feet beyond the crossing—south of the crossing. From that point, or 700 feet south of the point of tangent of the curve there is another small curve, 30 minute curve, which is approximately 200 feet long, making the end of that curve at station 21 plus 08.2. From station 21 plus 08.2 to station 35 plus 79.3 the track is constructed on a tangent. From station 35 plus 79.3 to station 38 plus 19.3, which is the point of tangent, it is constructed on a 1 degree curve.

From station 38 plus 19.3 to station 96 plus 62.3, a 30 minute curve. That is the P. C. of the 30 minute curve. Then from station 96 plus 62.3 to station 97 plus 82.3 the track is constructed on a 30 minute curve. Then from station 97 plus 82.3 to station 124 plus 90.1 it is constructed on a tangent and the last-named station is the P. C. of a 5-degree curve. Then from station 124 plus 90 to station 134 plus 58.4 it is constructed on a 5-degree curve, the last-named section being the point of tangent. Then from station 134 plus 58.4 to station 142 plus 84.1 the track is constructed on a tangent, said tangent being parallel with the centre line of the C., C., C. & St. L. Railway Company's west main track. Then from station 142 plus 84.1 to station 144 plus 56.6 it is constructed on an 8-degree curve. Then from that point on the track is practically constructed—that takes you up to practically the west right of way line of the Big Four tracks or the end of the track as practically con-[fol. 352] structed now. From there on I figure what the track would be. That takes you up to the point where the track has been constructed. Going from our track to the mine north, the track is constructed on a grade varying from what we call zero-zero, or lever, to 1.5% grade.

"Q. The first grade you reach in going as I told you from the Big Four track north on that track is reached at what point, or does it start on a grade?

"A. It is level." (Tes. 410-413.)

There is a grade between—upgrade, toward the mine all the way from station 140 plus 00—now this is working backwards on the stationing—to practically station 128. I have got to work out that grade on this profile. I have got it here. From station 0-0 to station 2 plus 50, the track is constructed on 00 grade, or what we call a level grade. The grade in the vicinity of our track starts at station 144 and runs back to station 142 and is constructed on a .5% grade. That is the first grade. From station 136 to 142 is level. From 125 to station 136 it is constructed on a 5% grade. Station 121 to station 125 is 0-0 grade, or practically level, which takes us down to the center line of the interurban crossing. That is also on the profile. We have got a higher grade there beyond the crossing for some distance. You will note from the blueprint on file Exhibit No. 30, that there is a grade which varies from 1% to 1.5%

west or north of the interurban crossing, which grade starts 600 feet north or west of the center line of the crossing. The top of the grade is reached at station 90 plus 00. That is 5,300 feet from the crossing. North it is down-grade from 3,300, and south it is downgrade approaching the crossing.

There is no obstruction in the way of buildings or trees at the Illinois Central crossing, but the view of the crossing is not very good from approaching trains from either direction on the I. C. on account of the curvature in the [fol. 353] track, the I. C. track being constructed on a curve. On the north side of the Illinois Central Railroad track there is some timber which, in a general way, may obstruct the view of an approaching train. This track enters the main switch of the track heading into the mine, which main lead is connected with the I. C. main track. This lead track runs east—northeast. Cars can be switched to this track and directly from that track to the Illinois Central main track. You have to go off the right of way of the Illinois Central to do that. Connected with that lead track, there is a main lead and 4 switch tracks. I know something about the progress of this work—the dates at which certain work was done. Laying started July 15, 1923, and was completed about November 11, 1923. The track work was started July 1, 1924;—January 1, 1924, and completed January 9, 1924. The two crossings—the one installed across the interurban track was installed January 3, 1924, and the I. C. crossing track was installed December 1, 1923. They are still putting ballast on the road now. Ballast was applied after the rails and ties had been placed, which no doubt started about January 1, 1924, to my knowledge. They could not apply the ballast until the rails and ties had been put down. They may have unloaded some ballast. It looks to me as if they are putting all cinder ballast on it. It runs from 18 inches to 2 feet thick.

(The exhibit previously marked for identification Exhibit No. 30 was received in evidence as Defendant's Exhibit No. 30.) (Tes. 413-417.)

Cross-examination:

This plat indicates the right of way of the Illinois Central. The point of switch where the present switch track is connected with the Illinois Central main track I would say before you cross the right of way leading off that point of switch, that there is about 75 feet or 80 feet beyond the [fol. 354] switch that—before you cross the Illinois Central right of way that could be used. Of course, I do not say you could switch 25 or 30 cars, but an engine and one car could probably make a switch there without getting over to the Dering Coal Company's property. I do not know what they had in mind when they constructed this track. I do not know that trains and cars could not be operated over the track on account of grades and curves, or something of that kind. I did not state the track was not safe for operation from an operating standpoint. We may run trains over that track and still could not call it a safe track. It has always been the practice of the C., C., C. & St. L. Railway Company, and also the practice of the railroads, and it is considered good engineering in laying out a track to try to eliminate as many curves as possible and keep the curvature down as low as possible. It has been the practice of the Big Four when we have received instructions from our chief engineer not to construct a track without getting permission from his office where it necessitates constructing a track on a curvature more than 8 degrees. For this reason, it is on account of the large engines which we are using at the present time, and in place of our engines getting smaller all the time, they are increasing the size of them, which makes it a very bad practice to operate over anything greater than an 8 degree curve. We are operating over tracks now with a small engine where we have more than an 8 degree curve. I do not know, to my knowledge, of any tracks constructed on more than an 8-degree curve in this Illinois field. We have not designed or laid out any track since I have been on the Cairo Division where we have used more than an 8 degree curve. We can operate over a 30 minutes curve very easily. Whether the grade of 1½% materially increases the hazard of operation depends upon the location of the grade. In this particular case I say it does because you will note in the print in approaching this crossing the track is constructed, as

I said before, on a 1% to a 1.5% grade, down-grade being [fol. 355] toward the crossing. In the case of an engine coming out of the Dering Company's mine and forced to stop 800 feet from the center line of this crossing there will be 960 feet of that train still back on this heavy grade. In case we come over this grade with 35 cars to the engine and the brakes fail to work, or if something goes wrong with the air there is no question but what the momentum back of this train would force this—before they could stop the train the engine would go onto the crossing, because it would be almost impossible to stop that train with hand brakes. As to whether those dangers could be regulated by derails: When you de-rail a 35-car train you have created a very bad condition. If proper precaution is provided for it would not be what you would call a safe track. As to where I differ with this layout on the question of safety: In the first place, I would change the grade in this track approaching the crossing. If possible, I would make it a level grade. Wherever possible, we try to construct tracks eliminating as many grades and curves as possible. It is good engineering practice to make it level. Where it is possible to do it, we do it. I took into consideration the cost. I think I ould reduce that 9 degree curve down to about 6. I would also recommend they install interlockers at each one of these crossings. Our grade on the branch leading to the Harco mine is ver ight. I judge not over .5. To my knowledge, it is not 1%. We have curves on that branch from 2 to 6. There are no 9% curves on there. To my knowledge we have no 9% curves anywhere on our system. We have not constructed any tracks where the curvature has been more than 8 degrees, since I have been on the Cairo Division. As to whether or not we are operating over a great many tracks where the curves are more than 9%: I know we have experienced a lot of trouble on account of derailments. It increases the cost of maintenance. As to where we had a derailment when operating over a 9% (degree) curve: In our main track south [fol. 356] of Parker, Ill., where we cross the I. C. Railroad, that portion of the track is constructed on a 9 degree curve and——. That is the main track. To my knowledge we have had as many as 4 or 5 derailments in the last four years. We operate a train each way daily in passen-

ger service over that track. We have a slow order on that track not to exceed, I think 20 miles an hour. You are right; we operate 4 passenger trains; two each way. I cannot tell you how many freight trains in addition to that. We operate a number of coal trains—what I mean, operating between Harrisburg and the Cairo Division. (Tes. 418-425.)

Mr. Herman, chief clerk, was employed under me at one time. He did not submit to me a layout of the tracks at this particular point in July, 1919. He was assistant on the engineering corps for the Big Four. I do not know anything about a conference with him in 1919 at Eldorado when a layout was surveyed. Between the Traction Line and the Big four, we can store about 35 cars. In addition to that we would not have 800 feet. A train containing 35 cars with one engine takes up 1,560 feet. The length of the track from P. S. 144, shown on the blueprint, to P. S. 125—the portion of the track lying between the traction line and the Big Four—is 1,801 feet. The average length of a car is 42 feet, and the length of an engine is 90 feet. In order to safely clear the switch, cars have to stand from a switch at a point where the track center is 13 feet—measures 13 feet from the center line to the center line. As to how far they would have to stand from the switch connection in order to be safe: It varies on this track. At station 144 you would be 136 feet, and at station 125 plus 99, it is 185 feet from the switch point, making the distance from clearance point to clearance point 1,480 feet, which figures the capacity of 35 cars. To my knowledge, the Big Four does not operate over the traction line at any point in southern Illinois. They operate across the traction line just south of Harrisburg to get into a mine. We have crossing gates [fol. 357] there. I do not know what kind have been suggested here. This is a gate. It is supported by a post, connected with the post, and the gate being held in position by hinges, which can be —. Where our switch track leads off the Big Four and crosses the traction line, it is on a tangent. The track that crosses the Traction Line that I referred to—the Rhondda Coal Company—was put in service about a year ago. We cross the Traction Line at another point to serve a mine—at Carrier Mills. Across that crossing, I think there is a gate; I am not sure. To my knowledge the Big Four has not physical connection at any point with

the Traction Line. I have no objections to offer concerning the rails and ties in the new track. South of Harrisburg we have 85-pound rail on our main line in southern Illinois. We do not have any 80-pound rail in our main track where we operate heavy trains between Harrisburg and Danville, Ill. It is all constructed of 90-pound rail. (Tes. 425-430.)

H. F. Milligan, having been previously sworn and examined, was recalled and testified further as follows:

Direct examination:

I am division superintendent of the Cairo Division of the Big Four Railway. The division extends from Cairo to Danville. That is the main line. I have been in the railroad service 24 years. We have 26 mines as a total on the Big Four at Harrisburg, or in the Harrisburg District, but there are 17 working. North of Harrisburg we have a total of 8 mines located on the Big Four, the Illinois Central and the Louisville & Nashville. On the Harco Branch, we have 4 mines, and south of Harrisburg we have 8 mines. I should say there are 12 mines south. I do not mean there are 8 mines located on the L. & N. and the I. C. north of Harrisburg. There are 4 located exclusively on the Big Four. Two are located jointly on the Big Four and the L. & N. Two are jointly on the Illinois Central and the Big Four. We have [fol. 358] 2 tracks from Eldorado to Harrisburg. They are all connected with the main line on the west side of our road, except one. Ogara No. 8 is on the other track. Harrisburg is our classification yard, particularly our loading classification yard. The mines are pulled and filled at various times during the day and night. It depends entirely upon the empty situation. Some mines we are forced to pull at noon on account of the fact that the loading tracks are not sufficient to run them the full 8 hours. All of that business is brought to Harrisburg and classified for the various destinations. The billing of the coal that is produced in the neighborhood of Eldorado is done at Harrisburg. All the billing is done there. There is no freight rate for any of the service connected with the mines on our road in that territory in the neighborhood of Eldorado except the regular rate, transportation rate, from Harris-

burg to the point of destination. In every case the loaded cars are taken from these mines to the classification yard, there classified and then set out. That applies equally to mines on what we call the Tarco Branch. I don't know anything about rates at all. It depends entirely on your car supply and entirely upon the empty tracks at the mine as to the number of cars put out to a mine at a time. Saying that the maximum capacity of the mine track is 50 cars and our supply of cars is unlimited, we would take 50 cars at a time. We have a hump yard at Harrisburg that we classify from. Our Chicago business is all classified in the yard so that it can go through to the principal destinations without a reclassification of the cars in the train. During a car shortage we classify our cars at Danville as between low cars, as between New York Central cars for New York Central lines fuel; as between Michigan Line cars for Michigan Central fuel; and we also bunch the Big Four hoppers or the Big Four high cars sufficiently to run them direct to the mine on arrival at Harrisburg. When those cars come in and are available for use and can be distributed to mines in the neighborhood of Eldorado, [fol. 359] if there is a car shortage, they are not taken to our yards before they are delivered to the mines—we set them off at Eldorado and distribute them from there. The inflow of empty coal cars from the north is from the New York Central from Danville. Speaking now about empty trains of coal cars, we will consume on an average with 80 cars approximately 16 hours from Danville to Eldorado. That is because we give the loaded movement preference. The delivery of cars at Harrisburg depends entirely upon the number of cars loaded at Harrisburg that day. We usually figure that in—it runs in trains. We figure we will have from 5 to 7 or 8 northbound trains. We run our empties to meet up with the northbound loads. The first empty train arriving at Harrisburg or Eldorada around 3.30 or 4.00 o'clock in the afternoon for the next day's loading. Cars will be coming in all the time during the night. Empty trains of cars during the night. If an accident should happen to our cars in being moved from Danville to that territory at any time, that would absolutely result in the failure of the cars to be delivered for the next day. It is true we have that hazard to contend with all the while, and sometimes it is a reality. If weather conditions

are such that our southbound trains were not able to arrive during the night on account of engine failure or snow banks that would interrupt the normal delivery of cars at these mines. That has occurred, but not from snow banks. From the Harrisburg standpoint, it is not uncommon to have a fluctuation of 20 or 22 degrees difference in the Harrisburg and Danville field. A very intensive study has been made of the present facilities and capacity of our yards and tracks between Harrisburg and Eldorado for handling additional car production. Back in 1922 when I first went to this division as division superintendent after getting acquainted with the characteristics of the railroad, I immediately made a survey of the Harrisburg Field, the switching and the classifying, and made an additional sur-
[fol. 360] vey of the Danville field, as to the switching and the classifying. I found the cars were being humped at Harrisburg and again being humped at Danville. I went before my direct superior with the information I had gained as to how we could handle the business at Harrisburg, and recommended in July, 1922, that we extend the Harrisburg field, that is, the Harrisburg yard, to the extent of 8 additional tracks in the northbound classifying yard; 5 additional tracks in the southbound empty yard; 6 additional tracks in the northbound receiving and loaded yard; 7 additional repair tracks and a passenger coach track to accommodate 15 cars, and the extension of our present southbound main from the north end of the Harrisburg yard, connecting up with this main track just south of the Harrisburg depot, at an expenditure of $424,420. My object was this, that by reason of classifying this business at Harrisburg, making the classification for final destination, that I could greatly reduce the per diem, greatly facilitate the movement of this business in and out of Harrisburg which at that time and which has since been very badly congested, up to loading of 1,000 cars per day. Up until the present time we have handled as high as 703 cars in the Harrisburg field in one day's period. (Tes. 430-439.)

Those cars, however, were bunched over the hump at Harrisburg, run to Danville and reclassified at that point. I was asked by the general manager who was on the railroad shortly after that and who had gotten a complete review of this case, how much additional business I could handle with the present facilities. I said, "Boss, not one

additional car. We are above capacity now. That is, to handle the business as it should be handled." Also, during that time the Ogara Coal Company was figuring on sinking an additional shaft in the vicinity of Eldorado to be served from the northbound main. The Big Creek Coal [fol. 361] Company was figuring on sinking an additional shaft in the vicinity of Galatia. The Harrisburg Coal Mining Company was figuring on sinking an additional shaft in the vicinity of Harco. We figured the additional tonnage to be received from these mines, together with Wasson No. 1 to build a new tipple, which would increase the capacity of their mines some 20 cars per day, the Big Creek 3 expected to increase their mine to approximately 100 cars per day, and since that time they have reached a total of 103 cars, and also Big Creek No. 4, which has since that time doubled its capacity. But, due to a number of mines closing down on account of market conditions, we have maintained an average of 525 cars per day (that is, during the month of January,) which enabled us to handle our business with our present facilities. None of the improvements that I have been talking about were made. With the business originating on the track between Harrisburg and Eldorado in the month of January it would not have been possible for us to handle any additional business without an additional running track between those points. We are peculiarly situated on our business from the south in as much as it is necessary for us to handle all of this business through the principal streets of Harrisburg over Poplar and Locust Streets. We had been approached by the City Council of Harrisburg as to the elimination of grades at that particular point. Any additional business handled over those tracks will in all probability force the elimination of grade at an engineer's estimate of $200,000 to eliminate the grades at that point. That is at Harrisburg. Between Harrisburg and Eldorado, not including the switching movements, the daily movements are 4 passenger trains; 9 freight trains south, 8 freight trains north, and one local freight train moved over the main tracks between Eldorado and Harrisburg on our peak day in January. Over the track there were 25 switching movements. A certain portion of these trains would operate over the track this track would be connected with.

[fol. 362] "Q. These trains operated over both tracks that you mentioned?

"A. That is all through trains, but of the 25 switching movements that moved over this particular track."

Any additional business on that track would result in additional hazard because we are to capacity and have been beyond capacity on that track causing very serious delays, business standing out in the yard from an hour and a half to two hours, waiting to get into the yard at Harrisburg. South of Harrisburg, we operate four local passenger trains per day, a local freight train on alternate day service, and a freight train in each direction per day from Cairo to Harrisburg. That is the extent of our operation on that particular track. Our business south of Harrisburg, that is, south of Carrier Mills, is not of sufficient importance or of sufficient amount to justify any additional service. The track conditions are particularly bad. That is as far as curvature is concerned, and the grades coming out of Cairo, we double sometimes 3 or 4 times to get into Harrisburg. The traffic from Cairo to Harrisburg is principally lumber and ties. We come out of Cairo with 1,600 to 1,700 tons, about a third of a train, that we handle north of Harrisburg, and we double 4 or 5 times with that tonnage. Our heavy locomotives go over that part of the road. We have just local coal movements over that part of our road, which is very small. I suppose our Cairo business from Harrisburg or the Harrisburg field would amount to probably 15 cars a month. There are no towns of any consequence at all between Harrisburg and Cairo. We do, however, connect with several railroads in that movement. From Harrisburg to Cairo, we cross the C. & E. I. and the Burlington; the Illinois Central is above grade, but it is connected. We have a connection also with the Illinois Central at Cairo, and one at Mound City. I have made an effort to ascertain the number of train movements on the Illinois Central from Eldorado, per day. A check was made of the [fol. 363] movement of trains on the Illinois Central by the Dering mine—passing the Dering mine between 5 p. m., February 8, and 5 p. m., February 9, which shows 28 train movements. (Tes. 439-445.)

A check was made for the same period at the location where the new track crosses the interurban. It shows a

movement of 51 trains by this location in a 24-hour period. At the interurban crossing with a movement of 51 trains per day in 24 hours, it is not reasonably safe to assume anybody would care to move those trains without interlocking protection. From an operating standpoint from the heavy curvature on the Illinois Central, together with the wooded patch which very heavily obstructs the view of an engineer coming in there, the movement of trains at that point very conclusively, in my mind, requires that an interlocking device should also be installed there. As an operating man, I would not think of operating over either one of these crossings without flagging them if there is no crossing protection put there other than gates that swing across the track. My experience with the interurban has been such with that number of movements that I would not permit it. The mines I said have increased in their production are Wasson No. 1, Big Creek 3 and 4—all local to the Big Four. The mines on the Big Four that have been in the last year or two producing company coal as assigned mines are Big Creek 4; Ogara 3 and 15 on Big Four fuel. Ogara No. 11 at Eldorado has been practically assigned Grand Trunk fuel. Ogara 3 and 15—especially 3 is—the total output, but practically all during this time we have had sufficient car supply to cover the field and the assigned mines did not have any bearing at all. In times of car shortage we operate on what we call a round-robin agreement. That is, we notify the operators of an evening how many mines will run the following day. In other words, if a mine is notified he will run he can be assured he will run 100% unless some unforeseen condition arises. There are times when these cars are enroute from Danville [fol. 364] to Harrisburg when we notify the operators that they will run the following day. If from any failure due, to our part, that is, railroad failure, we blow the mine off for a given period, an hour, or 2 or 3 hours, we make a note of it, the company gives us a sworn statement as to the time lost, and we know as to the time lost from the number of cars they have produced, and when they run 8 hours of lost time we make up the day. We give the company a day's time we have been responsible for. By the result of the round-robin we have absolutely satisfied operators. It is very seldom that there is any fussing because we know at all times what we are going to do the

following day. There is a continual fuss between the operators of this field and the Franklin County field as to the manner of distribution of cars in the Franklin County field. They distribute cars on a percentage basis. That is, as to the number of cars they have. If the mine is entitled—has a rating of 30 cars and they are only entitled to 20 cars, some mines will hold up and not run until they can get a full day's supply, and other mines will run on the 20-car supply they have. It results in a lot of dissatisfaction. The objectionable feature is because the mine is forced to blow off. If a mine has a capacity of say 30 cars and they get an assignment of 15 or 20 cars, when they exhaust their cars for that day, they blow off. The same thing happens the next day, during a car shortage; that is on the other lines, not on our lines. From our experience we find that operating on the round robin there is not as much inflation as there is under the percentage system. There is really no advantage for the inflation. Under the percentage system there is a marked inflation. That has been my experience. We do not have any trouble at all with the inflated rating or with the fussing with the operators; only minor. (Tes. 445-449.)

When a mine runs one day and there will not be cars enough for it to run the next day for a full day's running, under the round robin it closes down until its time comes again. Then when we do they are notified and they run. [fol. 365] They are not put to the expense of maintaining the overhead necessary to an operation for a day and getting to run only a half-day or a third of a day. At a joint mine, taking Ogara No. 11 for instance, this is how the round robin works: Supposing today he orders 15 cars from the I. C. and 15 from us, and he loads all of those cars. Tomorrow he orders 20 from the I. C. and 10 from the Big Four. He loads 10 cars from the Big Four the following day when he is not entitled to run, in addition to his I. C. loading. The next day he is hit on the round robin. We pull 10 cars away from him. Instead of giving him 20 cars we give him 10, or whatever his request would be. His request would be depending somewhat upon what his request on the Illinois Central was. I don't think he would manipulate that in some way. We watch that pretty closely all the while, and I do not think there is any chance. It is his priviledge to order more cars from the I. C. right along

until his day comes when he would ordinarily get a car supply on the Big Four and he flooded the Big Four with practically all the orders. There is some preference there.

On January 25 and February 5, we were offered a car of coal on each of those dates from the Dering Mine through the Eldorado gateway, that is, through our regular connection. Those are the first cars, in my recollection, or as far as I can find out, that have been offered through this interchange. That was January 25 and February 5 of this year. Our facilities are such that we can handle the entire output of a Dering mine even if they went to 100 cars a day. Agreeing that our facilities at Harrisburg could not handle the business, I can handle the business to Mt. Carmel and flat-switch it at that oint. There is no question about handling the business as far as the railroad is concerned, but our facilities in that immediate vincinity are, indeed, to their capacity. The Dering mine has had access to the facilities since their location in that field. The Illinois Central has had access to all of these facilities since 1901 when the contract was signed. The Illinois Central engine has the privilege of using all of our [fol. 366] tracks within the Eldorado district. Our house tracks and team tracks together with the tracks connecting with the Louisville & Nashville. They pull and deliver business to the L. & N. at Eldorado. They have had the privilege of that facility since 1901. That is the privilege that makes one of the Ogara mines right at Eldorado a joint mine. It was in November, 1922, when I first knew of their proposed connection. I came with the division of the Big Four in March, 1922. It was in November, 1922, when the trainmaster wrote to me and notified me as to this proposed connection. It was then a rumor at Harrisburg, and develops into what some other rumors developed into; that is, an actuality. I believe in the other hearing that it was my recollection your potential rating would be 90 cars per day. That was my understanding, and due to that understanding I said to my direct superior in November, 1922, that it was not possible for us to handle any additional business between Harrisburg and Eldorado or near Harrisburg filed [field] without additional facilities. That was an absolute requirement. In a general way the assigned mines are running between 98½ to 100% as against 10 or 15% reduction on the other mines. We

are not running assigned mines now. We were up until that time. That is, up to February 1. Then we stopped under a misapprehension. That word has gone forward, though. It was particularly true in the early part of 1923 that some mines did not have contracts to keep them running from day to day to supply their contracts, but since the latter part of September, 1923, up to and including January of this year, they have run fairly steady. To a certain extent it is true that when mines are not being operated at full peak when they have a car supply in that territory that the mines that have these railroad contract or contracts to supply some institution run from day to day, continue to run right through that period while the other mines are closed down for want of orders and want of business. There are some of them, of course, that evidently [fol. 367] maintain a sufficient sales organization to handle their business. The Harco mines, for instance. (Tes. 449-454.)

As to the testimony of Mr. Pauley and other witnesses who have made a comparison between the Ogara mines and the Harrisburg Coal Company's mines and the Dering Company's mine as to running time on account of the fact that the mines on the Big Four have these contracts that keep them constantly busy: There is no comparison. We might take Ogara 12 or some Ogara mine that is not on company coal that we will not accept company coal from, and I think it would make a very good comparison with the Dering Company's mine as to their operation. I misquoted a statement a minute ago as to Ogara No. 11. The Illinois Central have their own tracks into 11 and they lead from the Illinois Central tracks. By reason of the contract I said they got into 11. That is not a fact. They can get into 11 regardless of the contract. They do not use a portion of our track to get in there. That is No. 10 where they use it. That is No. 10 right in Eldorado. (Tes. 454-455.)

Cross-examination:

Referring to blueprint, Exhibit No. 29, starting at the mines south of Harrisburg and running up, the mines actively producing are Saline gas, Ogara No. 14; Ogara No. 15; Wasson No. 2; Saline gas No. 2, and the strip mine.

Ogara Mines Nos. 7, 5, 4 and 2 are not in operation, and have not been in two years. Today Ogara have 9 mines in operation and of those, one, No. 9, is closed temporarily. The present 9 mines of the Ogara Coal Company have been in operation for a number of years. Except for a new tipple in No. 12, which was reconstructed this year, none of them are new mines. None of them have been reconstructed within the last 10 years. As to the probable life of any one of the Ogara mines, I have no knowledge except the coal field is quite extensive. So far as switching cars in and out over the connection, there is no substantial difference in the proposed connection as shown here with [fol. 368] the Big Four and the connection of the Big Four wherein we get into the Wasson mine located just north of the proposed connection, as far as the physical connections are concerned. If the track was not to capacity, it would not be any more hazardous to switch in cars and set them in on the proposed track than it would be to take cars out of the Wasson mine, so far as physical operation is concerned. It would be just one additional main track opening, which is always an additional hazard. Assuming we did not operate over the track mine, the only hazard would be the fact that we would have one more switch cut into this track. Referring to blueprint, Exhibit No. 30, the words "passing track" indicate the passing track at Eldorado. That is not the name of the track which the Dering switch will connect into. These are two main tracks here, and this is a passing track. The two parallel tracks on this exhibit are the north and southbound main, located between Eldorado and P. C. 142 plus 84.1. One of those tracks is not designated "passing track"; maybe the engineer can tell you what it means.

Danville is a division point and we have a very good assembling yard there. During the regular run, all empties are first collected at Danville, but during a heavy business we secure cars rom the St. Louis Division at Paris also. As a general proposition all of our empties do go to Harrisburg.

"Q. And it is only in exceptional cases where in times of car shortage and where the trains are late that you might so plug the mines north of Harrisburg without taking the empties to Harrisburg?

"A. That is an interruption of some kind on the railroad which would force the cars to arrive at that point late. We would fill the mines closer to Harrisburg and north of Harrisburg and on the Saline Valley in preference to the mines south, figuring on stopping the trains at Eldorado, setting off empties on the passing track, which I have tried to desig- [fol. 369] nate on this blueprint, and filling the mines from that point with a switch engine. If we have an additional mine to serve between Harrisburg and Eldorado the congestion I mentioned would be brought about by the movement of the traffic between Harrisburg and Eldorado, both loads and empties.

"Q. So far as north of Eldorado is concerned, you have ample motive power to handle a great deal more business northbound. If it was delivered to you at Eldorado there would not be any difficulty in the handling of traffic?

"A. I could handle it with the necessary interruptions that we would have, of course."

If it was delivered to us in 10 or 20 carload lots by the Illinois Central it could be handled without difficulty. The proposed location is just about the center of this track. In handling business to and from your running track or run-around track, we would naturally block that main track in the handling of that business, provided it reaches over 30 cars, and you have said you would give us all the business you could give us. On the movement of empties southbound to the Harrisburg field, we could not set in 10 or 20 cars on the proposed connection with our road crew. We would necessarily have to set them off at Eldorado and the connection being closer to Harrisburg, we would be forced to take the cars to Harrisburg. We cannot do that with the road crew on account of the expense. The expense is too great. From an operating standpoint it could not be switched from Eldorado to the connection and save going through the Harrisburg yard, because the distance is too great. We would naturally take the cars to Harrisburg. Our switching limits at Eldorado extend from north of Eldorado to Carrier Mills on the south. The switching limits extend clear from Eldorado to Carrier Mills. This connection would be in the middle of the switching district, but on a very busy track. I mean by that, this is the switch-

[fol. 370] ing district, the point I gave you, from an operating standpoint. From an operating standpoint, the connection is within the switching district. With respect to my recommendation to increase the facilities of the Big Four to take care of the tonnage of the Ogara, Big Creek and Wasson coal companies that I expected to be tendered by those companies, there has been nothing done because of the decrease in the other business, and our business has not increased to the extent that we expected it. I suggested increased yard facilities at Harrisburg. That was suggested in July, 1922, immediately after I took charge of the division. My survey as to the business being handled was made in July, 1922. I know nothing whatever about an extension of the Big Four proposed to run out of Harrisburg toward West Frankfort, tapping a large section of Franklin County and its many mining centers appearing in the Coal Age of March 15, 1923. I have not heard anything about it. I know that it appeared in the Harrisburg paper, but the source of it I do not know. (Tes. 454-464.)

The operating conditions over our main line south of Harrisburg would be a good deal more difficult than the operating conditions over this piece of track leading to the Dering mine, on account of the grades and curves, but we have not the hazard of business. If we had the business south of Harrisburg we are handling north of Harrisburg we could not handle it at all. Where I say there were 28 train movements, that includes train and engine movements. They run six passenger trains. We would naturally class a cut as a train movement, that is, empties out or loads back. Movements of the switch engine back and forth into the yard would not be considered. These were absolute movements over the crossing. That is, with a cut of cars. Not in switching. There were no switch movements taken into consideration at all in this report. On this division there would probably be a local freight train each way. [fol. 371] In addition to that—outside of the passenger trains and the local train—they run a freight train in each direction; that is, two trains, and the miners' train taking the men to work. In addition to that, these movements naturally would be movements serving the Dering mine. Outside of the movements mentioned, there is not much

other business, as a general proposition, on this line. The 51 movements on the traction line consists of passenger and freight—hourly service. South of Carrier Mills, where we cross the Traction line, we have less than half of what we have north. We have 2 crossings at two points. We have gate protection in addition to flag protection. We do not take a chance on going over those crossings without a flagman. They don't have the same passenger schedule at Carrier Mills that they do north; they have not the business there. The business is much lighter south than it is north. Under certain conditions, there is no question about it that the joint mine has the advantage on the local mine in the matter of car supply. That is from a practical standpoint, the mine that is served with two lines of railroad is bound to have some advantage—not in car supply. He gets the same percentage. In every instance we take into consideration the cars that are delivered to these mines by the Illinois Central. They have to report to us the night previous to the day's run the number they loaded on the Illinois Central that day. (Tes. 464-468.)

Redirect examination:

We own approximately 39,000 acres of coal land there—that is the Big Four does. I do not know just how much of that the Ogara has. The Big Four owns the coal and it is leased to the Ogara Company, and they operate the mine, on a tonnage basis. By that I mean, 2½c to 3c a ton royalty basis. With reference to Harrisburg, the Rhondda Coal Company track is located south of Harrisburg. The putting in of that crossing was resisted by the Big Four. The Illinois Central runs one of the best trains [fol. 372] they have over this line. There is only one train on our line, according to my understanding, in Illinois, that is faster than that. It is the Seminole Limited. That is in addition to the movement of their freight business from St. Louis to Eldorado over this track. They have a very heavy amount of freight, and they give first morning delivery on the Eldorado business out of St. Louis over this track from Duquoin to Eldorado. That is the old Belleville & Eldorado road that is now owned by the Illi-

nois Central, and it extends from Eldorado through Duquoin on to Pinckneyville, Belleville and East St. Louis. It is a very direct line and they have got a very good service. (Tes. 468-470.)

Recross-examination:

Generally, this 39,000 acres of coal land on the Big Four surround Harrisburg. It is not all leased to the Ogara Coal Company. The majority is, and the Ogara Company obtained their lease from this tract of land. The railroad owns title to it. To my knowledge, the railroad has no interest in the Harco mines and none of its officers are directors. None of the officers or agents have any interest in this 39,000 acres of coal or and land adjacent thereto, to my knowledge. I could not say how long the railroad company has owned this 39,000 acres. It has been for a number of years.

I made recommendations for these additional facilities long before any hearing in this proceeding, in July, 1922. (Tes. 470-471.)

E. S. Jackson was called as a witness by defendant and, being first duly sworn, testified as follows:

I am Chief Clerk to the Superintendent of Freight Transportation of the Big Four Railroad located at Indianapolis. We handle the general distribution of cars in the Harrisburg-Eldorado district and get daily reports of the detailed distribution. I have prepared a statement there showing the percentage of cars furnished and cars ordered in that district, by mines and by totals. This exhibit shows cars [fol. 373] ordered by months, covering January 1 to December 1, 1923. I cannot give the names of the mines and the per cents, and I have not an exhibit so showing. I have it divided by joint mines and the straight mines, and the per cents of the cars which are operating on railroad fuel. I have not a copy of it, Mr. Cardy, so that you can follow it. The joint mines for the year 1923, consisting of 4 mines, ordered a total of 16,991 cars, and were furnished 13,771 cars, or 81%. The local mines ordered a total of 95,218 cars, and received 78,525, or 82.4%. The mines operating

on railroad fuel exclusively ordered a total of 15,985 cars, and received 15,727 cars, or 98.3%. I have made a comparison of the running time of the mines other than mines assigned to company fuel. I have prepared a statement and have it here showing the same separations, and showing that the joint mines ordered during the months of January and February, 1923, a total of 4,599 cars. They received 2,637 cars, or 57.3%. The local mines during the same period ordered a total of 26,246 cars, and received 15,298 cars, or 58.2%. The mines operating exclusively on railroad fuel ordered 2,958 cars, and received 2,882, or 97.4%. I do not have the detailed figures by which I could prepare a like statement covering the other periods. The last period was January and February, 1923.

Cross-examination:

In 1923 the joint mines received 13,771 cars, or 81%. That was Big Four. I don't know how many cars those mines received from the Illinois Central or the other roads upon which they were located during the same period. If those cars were taken into consideration, I do not think the relative car supply between local and joint mines would materially change. With the record there for January and February, 1923, I did not check up what the Dering Company's mine running time there was. The exhibit does not show, and I don't know whether it was more or less than 58%. (Tes. 472-475.)

[fol. 374] W. T. Stevenson was called as a witness by defendant and, having been first duly sworn, testified as follows:

Direct examination:

My name is W. T. Stevenson. I am Traffic Manager of the Big Four Railroad. I have been in the railroad business for 34 years. I have been Traffic Manager of the Big Four for 4 years. I have been in the service of the Big Four 29 years. I am acquainted with this controversy from the time of its inception. I was familiar with it when the question first arose and a complaint was filed before the

Illinois Commission and before the Interstate Commerce Commission some years ago. It is my recollection that the Illinois Commission case was abandoned. The Interstate case was decided and has been referred to in this proceeding. I only know about any arrangement that was made before that case or any conversations or any negotiations in relation to that question in a general way. Immediately prior to the filing of the complaint or along in the summer of 1919 we were approached by the Dering people to build a track about as the proposed track has been constructed. In other words, to construct a track between the mine and our line. I know that there was more or less negotiation between Mr. Brister, who was then traffic manager of the Big Four, and Mr. Pauley, and the matter was submitted by the operating officers of the Big Four at that time to the corporation officers in New York. My understanding is that the corporation officers declined to consider the matter.

Mr. Worcester at that time was not connected with the Big Four. He was district manager. Mr. Costin, who is now general manager, was at that time Federal manager. At the time I refer to, Mr. Smith, who had been Regional Director of the Eastern Region, had returned to the corporation and was then president, but not in charge of the railroad. He was not operating the railroad; that was under Federal control. There was a complaint filed with the Illinois Commission first. Following the filing of that complaint, complaint was filed with the Interstate Commerce [fol. 375] Commission, I. C. C. Docket 10945. That case was decided in the summer of 1921. In August, Mr. Cardy wrote me and stated he would like to have a conference in Chicago. I met him in Chicago on September 14, 1921. I have a memorandum of that conference. Mr. Cardy referred to the decision of the Interstate Commerce Commission in Docket 10945 and expressed a desire that the Big Four serve the mine in some way. The matter was discussed at considerable length, and I do not know that I can do better than to read from this office memorandum. I dictated it as soon as Mr. Cardy left the office.

(Reading:) "Mr. Cardy then asked me to state what, if anything, the Big Four would be willing to do in connection with serving Dering Mine No. 2. I told him I knew of a conference Mr. Pauley had with Mr. Worcester

several weeks ago, but did not know the result of the conference and was therefore not in a position to discuss the matter. He then desired to know if the Big Four desired to secure all the business possible; if so, why we did not care to handle their shipments from Mine No. 2. I told him as an abstract proposition the Big Four, of course, desired to secure all the business possible, but we had a large area of undeveloped coal lands served only by the Big Four and personally I felt if we had money to spend for development purposes it should be spent to develop property dependent upon the Big Four, and not develop property served by the Illinois Central. In addition, that our present facilities are less than adequate to handle the traffic dependent upon us for outlet, and I felt our operators were entitled to the maximum use of available facilities. Therefore I was not prepared to discuss any plan without taking the matter up with Mr. Worcester and the attorney who handled the complaint."

The latter sentence refers to the fact that Mr. Cardy suggested several different ways that we could accommodate him. Mr. Cardy at that conference asked me to let him know what, if anything, we would do. I discussed the matter with Mr. Worcester and it was given very full con [fol. 376] sideration and I wrote him on November 1, 1921, a copy of which letter was submitted by Mr. Cardy in his Exhibit No. 1. In that letter I stated all we would be willing to do would be to make track connection. (Tes. 475-480.)

At that time we did not discuss a track connection should be made that would become a part of the railway highway of the State and subject to operation under the directions of the Commission, or at the will of persons who might apply to use it. The only track that was ever discussed as being at all possible was a private mine spur. At the conference I had with Mr. Worcester prior to writing my letter of November, 1921, neither myself nor Mr. Worcester had any information that Mr. Pauley was in conference with the Illinois Central and attempting to make an arrangement by which the Illinois Central would have an interest in this track, the right to operate over it, and the right to extend spurs from it. Neither of us had any idea of any such thing. I had assumed after writing that letter that the

question was practically dead. But, much to my surprise, in September, 1922, I received a report that the Dering people were figuring on building such a track. In November we were asked to have a representative meet Mr. Pauley at Eldorado to consider the question of a mine connection. That is, November, 1922. Just prior to or about that time I received a report that there was a probability that the Illinois Central would be permitted to use this track; also that it was contemplated that the Wasson Coal Company from their Mine No. 1 would use it.

A short time after that our Assistant General Freight Agent, Mr. Burgee, had occasion to call on the Dering Coal Company people with reference to the proposed track, and Mr. Burgee reported to me that he had gotten the idea from discussing the matter with Mr. Pauley and Mr. Cardy, that the Illinois Central would have the right to use the track and that the Wasson Coal Company would have the right to [fol. 377] use it. When I first got that report and advised Mr. Worcester of it I also advised him of the report made by Assistant General Freight Agent Burgee. A little while after that, or December 16, there was a conference held in Mr. Worcester's office at Cincinnati, at which were present Mr. Worcester, Mr. Pauley and myself, Mr. Pauley having made the visit for the purpose of discussing the construction of the track and making connection with our line. Mr. Worcester at that time declined to agree to have the connection made. If it was made, to operate over the track or to furnish cars. The conference occurred after I had reported to Mr. Worcester that the contemplation was that the Illinois Central and the Wasson Coal Company were both to use this track. At that time we had no knowledge that he was also negotiating with the Southern Illinois Railway & Power Company to make an extension of the track to a connection with the main track of that company, and the operation of its cars and motors in the transportation of both freight and passengers over that track to the connection of the Illinois Central at the Dering mine. I do not like to give Mr. Worcester's thoughts, but I do not think he ever had any idea of furnishing cars or for operating over the track, and in the absence of doing those two things, making a track connection would not benefit anybody. It has never changes [changed]. I have prepared an

exhibit to illustrate the territory that these operations cover with respect to markets, etc.

(The paper referred to was marked Exhibit No. 31 for identification.)

Explaining Exhibit No. 31: The coal carrying roads serving mines in Indiana and Illinois have a bureau known as the Illinois-Indiana Coal Bureau, of which Mr. C. A. Gallagan is chairman. I am not familiar with the Honnold Bureau. The roads producing coal report to Mr. Gallagan the movement of coal from their respective lines to an agreed list of segregated destinations which are as indicated on this exhibit. The exhibit has been prepared from Mr. Gallagan's [fol. 378] reports. It shows the movement of coal from mines on the roads indicated for the first 11 months in 1923, which was as much of that year as data was available for. This exhibit covers the coal tonnage of the Big Four, the Illinois Central, the C. & E. I., the C., B. & Q., the B. & O., the L. & N., and the Missouri Pacific. All these roads serve the so-called southern Illinois group. So far as I know they are the only coal roads serving that group. There are some minor roads like the Marion & Eastern. The next to the last column shows the total tonnage of all those roads to the destinations shown on the extreme left side of the sheet. The last column is the percentage of the total movement to the various destinations. The southern Illinois field is the most southern—that is, the Harrisburg, Williamson County, Jackson County, field, is the most southern coal field in the state of Illinois. (Tes. 480-485.) The statement shows no movement of coal at all to Kentucky. It shows a very heavy movement to Missouri for account of the I. C. and also for the C., B. & Q., and the Missouri Pacific. It shows an extremely light movement for account of the Big Four Railroad to Missouri; a large part of the Missouri territory is reached through St. Louis and the rates, to a great extent, are based on that gateway. We have no route from the Harrisburg district to St. Louis that is practical. Our distance is too great as against the direct line. It also shows a very heavy movement to Iowa for the Illinois Central and the C., B. & Q., both of whom have direct lines into that territory. There is a material movement into Iowa from the Big Four from the southern Illinois field, but not equal

to that from the Illinois Central field, or the C., B. & Q. field. There is a very large movement shown to Indiana for account of the Big Four; a material movement for the I. C. and the C. & E. I. and a very large movement for account of the C., B. & Q. I might say that a very material proportion of the Big Four tonnage, to Indiana, "except otherwise shown" is railroad fuel, practically all of which was for New York Central System lines.

[fol. 379] Of the tonnage under the heading which I have just qouted only 40,000 tons for the 11 months was destined to points on the Big Four Railroad. That is about 1% of the tonnage from the Harrisburg field moving via our line. I did not say local points. I said points on the Big Four. That is local or common points. That means only to points which were located on the Big Four, but as for distinguishing local points, it includes local and common points. I want to point out that the Illinois Central handled 172,000 tons to South Bend, whereas we only handled 32,000 tons. The Illinois Central's own rails do not extend to South Bend. The C. B. & Q. have no rails in Indiana. To Indiana to the segregated destinations indicated as "except otherwise shown," they handled 352,000 tons, in round figures. I do not know their route; it must be a two-line haul necessarily. I would like to call attention to the fact that the Illinois Central handles substantially as much coal tonnage into Michigan as did the Big Four, as indicated on Exhibit No. 31. I can tell you in a general way if the New York Central lines use assigned cars in this territory to a large extent. They did until the first of February, but I cannot give details. The contracts are spread, I know that. But there have always been assigned mines in the Harrisburg District. I will not say "always" but in the past several years, anyhow. My understanding of an assigned car mine is that it is a mine assigned exclusively to railroad fuel. I mean that is under the Commission's decision. An assigned car was a car for use of railroad fuel and was not counted in the general distribution—not counted for commercial coal, even though that mine might ship commercially. That was at one time my understanding. More latterly my understanding of the assigned car was that the mine had to be operating on fuel exclusively. I don't know much about distributing cars.

(Exhibit No. 31, previously marked for identification, was received in evidence.)

[fol. 380] I have prepared another exhibit that relates to the *ba* from the Saline County district. This Exhibit, No. 32, is prepared from the data shown in Chairman Gallagan's report, previously referred to, and covers the tonnage billed from Eldorado and from Benton, Christopher, and Logan, Ill., by the Illinois Central for the period January 1, to November 30, 1923, inclusive. Those 4 billing stations are the billing stations of the Illinois Central for all mines Eldorado to but not including Duquoin. This exhibit I think more clearly shows the distribution of the coal from the points mentioned in the exhibit than could be obtained from the distribution of the Illinois coal in Exhibit No. 31, for the reason that Exhibit 31 covers the entire southern Illinois field. This exhibit shows that billed from Eldorado and the other 3 points previously mentioned separate. It also will show the volume of the coal traffic handled on the division of the Illinois Central between Eldorado and Duquoin.

(Exhibit No. 32, previously marked for identification, was received in evidence.) (Tes. 485-491.)

As near as I have been able to ascertain, coal was first shipped from our Saline County mines about 1902, but the volume moved at that time was negligible. Between the date mentioned and 1905, the potential possibilities of the field became apparent. At that time the Cairo Division of the Big Four was a single track roadbed, light construction, largely timber bridges and heavy grades. The grades made the handling of large coal traffic prohibitive. In addition, the track, roadbed and bridges were of inadequate capacity to carry heavy engines and equipment used in the economical handling of coal traffic. Further, the terminals were totally insufficient to handle the prospective business resulting from the development of the coal field.

Starting about 1905, the Big Four began the expenditure of large sums of money to provide facilities necessary in the development of this coal field, and such facilities have been constantly increased to date. The road between Dan- [fol. 381] ville and Harrisburg, a distance of 190 miles, was

rebuilt. Double track has been laid between Lyons and Chrisman, and Eldorado and Carrier Mills. Extensive yard and engine terminals were built at Lyons, Mt. Carmel, and Harrisburg. The construction of the new line was of the most permanent character, bridges all being of concrete and steel and of such a capacity to carry the heaviest locomotives. The entire line was first relaid with 80-pound rail, ballasted with gravel, maximum grade 3·10 of 1%, which permits the handling of 5,000 ton trains northbound. Subsequently, practically all of the 80-pound rail has been replaced with 90-pound rail. Extensive passing tracks were constructed in order to permit the handling of long trains of empty coal cars southbound without interfering with northbound heavy tonnage trains. Interlocking plants were established at railroad crossings, and where practical grade crossings of highways eliminated. At Lyons a terminal was constructed, with yards for north- and southbound traffic, repair yards, engine house, turn table, coaling station, water station, track scales, car repair building and other features necessary to an engine terminal.

At Mt. Carmel there was built a yard, coaling station, water tank, engine house, turn table, and extensive shop buildings. At Harrisburg there was constructed a large hump yard with track scales, engine house, turn tables, coaling station and water tanks.

The facilities referred to at Lyons, Mt. Carmel and Harrisburg are inadequate and must be increased in order to properly take care of the increased coal production. Up to about a year ago capital expenditures for track and yard facilities incurred for the purpose of developing the Harrisburg coal field, amounted to $9,100,000, in addition to which maintenance and renewal expense is quite a material amount per annum. We have also incurred large expenditures for the purchase of coal equipment. In 1905, we owned 5,484 cars of an estimated value of $3,451,410. Our ownership as of January 1, 1924, consisted of 16,321 coal [fol. 382] cars of an estimated value of $20,104,519. We have invested in power, engaged in handling coal traffic on the Cairo Division, $1,856,010. For the first 11 months in 1923 the Harrisburg District produced 48% of the coal tonnage on the Big Four System. Allocating 48% of the total investment in equipment to the Harrisburg district mines,

shows an investment in cars for handling coal from the district of $9,650,169. Add to this amount the investment in power and equipment for the handling of coal traffic on the Cairo Division of $11,506,179. Adding to the amount just mentioned $9,100,000, representing capital expenditures for track and yard facilities, it shows the Big Four has invested approximately $20,606,179 in facilities for the handling of coal traffic in the Harrisburg field. Statistics covering the movement of coal traffic from mines on the Big Four are unfortunately not available prior to 1908. In 1908, we owned 6,343 coal cars; the total tonnage originating at mines on our line for the coal year ending March 31, 1909, was 3,781,000 tons, of which 2,292,000 tons originated in the Harrisburg district.

The last coal year which could probably be considered normal was that ending March 31, 1919, at which time we owned 14,013 coal cars. During that coal year we moved from all of our mines 6,977,000 tons, of which 4,093,000 tons were produced in the Harrisburg field, and during a large part of that coal year our supply of cars was far from adequate to fill orders.

The largest volume of coal produced at mines on the Big Four was during the coal year ending March 31, 1918, during which year the total production was 7,345,000 tons, of which 4,326,000 tons were produced in the Harrisburg field. As illustrative of the development of coal tonnage from Big Four mines, for the year 1923, there was produced at all of our mines 7,194,000 tons. During the first 11 months of 1923 the Harrisburg District produced 3,848,000 tons; reconstructing this figure to a 12 months period on the basis of average, and it shows the Harrisburg District produced [fol. 383] for the 12 months 1923, 4,197,000 tons. Both of the figures mentioned, i. e., the actual production from all mines, and the estimated production from the Harrisburg district mines, are greater for the calendar year 1923 than for any previous coal year except that ending March 31, 1918. The latter covered the war period when maximum production was urged and when the zoning regulations of the United States Fuel Administration were in effect. On the other hand, I believe, it is conceded that the calendar year 1923 as a whole was not considered a good business year from the standpoint of the Illinois operators.

The total daily rating at present of mines on the Big Four System is 83,453 tons, which figure is less than normal owing to depression in the coal business precluding maximum production. Assuming a year of 200 working days for the mines, with the above depressed daily rating we have a potential production per annum of 16,690,000 tons as compared with maximum production for any one coal year of 7,345,000 tons, for the year ending March 31, 1918, at which time we owned 14,121 cars, and could not begin to supply the demand. At present we own 16,321 cars, which are obviously inadequate to take care of the potential production. It is apparent, therefore, that regardless of the heavy expenditures previously referred to for the purpose of providing facilities for handling coal produced on our line, we have been unable to keep pace with the demand. (Tes. 492-497.)

It is my understanding we have the same experience on our road as others do. I don't have anything to do with car supply. I only get the rating from the daily mine report that comes into the office.

(Map referred to was received in evidence as Exhibit No. 33.)

Exhibit No. 33 is a map of the State of Illinois. The line of the Illinois Central Railroad is indicated in blue; the line of the Big Four Railroad in red, and the line of the New York Central between Danville and Sheff is indicated [fol. 384] in yellow. That is simply a graphic illustration of each territory occupied by the two lines and in relation to the markets available on each, respectively, to the mines local to them, and to connections for through traffic to other states. (Tes. 497-498.)

Cross-examination:

The New York Central Railroad owns control in the Big Four Railroad, but they are operated separately. I do not know anything about the physical handling of traffic through Danville. Offhand, I do not know what the division of the New York Central line is of the Chicago rate; I would say my guess would be our proportion would be somewhere from 60 to 75%. Mileage has something to do with it, but it is not the only factor taken into consideration.

"Q. After my conference with you of September, 1922, wherein it was suggested that we desired a connection with your company for the purpose of serving this mine, as I understand it you took the matter up with Mr. Worcester and it was agreeable to make a physical connection with a track we might construct?

"A. Yes, but that did not contemplate serving the mine in furnishing cars.

"Q. Mr. Worcester did not change his or you did not change your views on that matter until you learned the Illinois Central might at some future time use this track to invade your territory, as you termed it. Is not that the fact?

"A. That is what made the objection to making the connection, yes, but I cannot conceive of what possible advantage or use there would be in having a connection if we were not going to serve the miners to furnish the cars.

By Director Bartel:

"Q. That was what I was wondering, Mr. Stevenson. In that letter you wrote to Mr. Cardy November, 1921, you said you had no objection to making a connection there.

"A. Yes, sir.

"Q. What good would the connection be unless you served the mine?

[fol. 385] "A. None whatever. That is why I said I was surprised to find out about 8 months afterwards that they were getting ready to build a track.

"Q. You told them to build a track and you would make a connection. Didn't you know if you made a connection it would be necessary for you to serve that connection?

"A. I knew, but I did not suppose telling him we would only make a connection that he would go ahead and build the track. In other words, that was tantamount to saying no without saying no.

"By Mr. Cardy:

"Q. In other words if we would spend $100,000 and make the connection, you would agree to the connection, and you felt as though you could agree to that because even if you did make the connection, you would not serve us, and

you had that in the back of your head when you wrote that letter?

"A. The letter did not say anything else."

* * * * * * *

"Director Bartel: This is the letter from you, I think: 'If your company cares to construct and maintain at your own expense a track from your mine up to our line, we will be glad to effect connection with such track, the point of connection of course to be designated by our operating department.'

"The Witness: That was just a nice way of saying no. That is all it was." (Tes. 498-501.)

When Mr. Worcester and myself determined that we would not make any connection at all because the Illinois Central might invade the Big Four territory, I do not know whether Mr. Worcester gave any thought or not to the provision of the Transportation Act which, if the Illinois Central attempted to use this track, would make it necessary for them to present the matter to the Interstate Commerce Commission. It was not discussed. I certainly did not. We sent a man to Eldorado to go over the ground before the conference with Mr. Pauley and Mr. Worcester at Cincinnati. I received a telegram on November 22, 1922, from [fol. 386] Mr. H. J. Burgee, Assistant General Freight Agent of the Big Four, at Chicago, reading as follows:

"Mr. Cardy of J. K. Dering Coal Company advises that Mr. Pauley, Vice President, will be in Eldorado tomorrow and for two or three days after tomorrow, and he asks that we have an engineer at Eldorado on Wednesday, November 22, to meet Mr. Pauley to consider the question of track connection from their mine to the Big Four. Advise if such an arrangement will be made."

I have a letter from the engineer, maintenance of way, Kissell, dated Mt. Carmel, Ill., November 29, to the Chief Engineer, C. A. Paquette, acknowledging receipt of his, Mr. Paquette's, wire of the 21st, and advising he had been in touch with Vice President Pauley of the Dering Coal Company. That is November 29.

There is no question at issue with the Rhondda Coal

Company. They have got a connection and we are serving them. Nobody else could possibly serve them. They are located exclusively on our line. There is no industry that I know of that has a track connection with the Big Four Railroad that the Big Four will not receive shipments from tendered to it at that connection. There are some industries that have connections with our lines that have connections with other roads direct. There are no mines on our line that are served by 3 connections that I know of. (Tes. 501-504.)

H. F. Milligan, previously sworn, was recalled and testified:

Cross-examination:

The traffic from Harrisburg to Chicago in connection with the New York Central lines is not handled any differently than the business coming at any other point, such as Cincinnati or Cleveland. The yardmaster there is not a joint employe of both companies; he is a Big Four employe. I operate the yard. I am in entire charge of the New York Central yard there. It is under my jurisdiction. I am an officer of the Big Four.

Direct examination:

The New York Central simply has use of that track just [fol. 387] like the Illinois Central has at Eldorado. We have a joint agent at Eldorado just the same as we have at Danville. We run solid trains right from Harrisburg to Chicago. (Tes. 505-506.)

(Hearing closed.)

[fol. 388] The exhibits offered in evidence in connection therewith are as follows:

[fol. 389] *Abridgement of Exhibits*

Statement re Exhibit No. 1

Item 1. Letter H. A. Worcester to James B. Pauley, dated June 25, 1917;

Item 2. Letter H. A. Worcester to J. K. Dering, dated October 8, 1917;

Item 3. Letter H. A. Worcester to James B. Pauley, dated October 22, 1921;

Item 4. Letter H. A. Worcester to James B. Pauley, October 28, 1921;

Item 5. Letter W. T. Stevenson to Clarence B. Cardy, dated November 1, 1921, all quoted in full in petition or bill pp. 17 to 21 inclusive;

Item 6. Letter Clarence B. Cardy to H. A. Worcester, dated December 27, 1922, enclosing notice and request "for switch connection with private mine track of J. K. Dering Coal Company in Raleigh Township, Saline County, Illinois."

Notice dated December 22, 1922, addressed to The Cleveland, Cincinnati, Chicago & St. Louis Railway Company:

"The J. K. Dering Coal Company hereby makes application to you for a switch connection with the tracks of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and the private sidetrack and mine spur of the J. K. Dering Coal Co. in Raleigh Township," etc. "for purpose of serving the mine of the J. K. Dering Coal Co. located about two and one-half miles northwest of the main track of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company." * * *

Further notified that the coal company desires switch connection with said main track of the railway company adjoins the following described lands to-wit:

"Beginning at a point on north right-of-way of Cleveland, Cincinnati, Chicago and St. Louis Railway, where the [fol. 390] land line running east and west, through center of Section Thirty-six (36) crosses said right of way line and measure west on said land line One Hundred Sixty-one (161) feet, thence southwesterly Two Hundred Thirty-eight (238) feet to north right-of-way line of Cleveland, Cincinnati, Chicago and St. Louis Railway; thence northeasterly along said right-of-way line Three Hundred Twenty-four (324) feet to place of beginning, all in the Northwest Quarter (¼) Southeast Quarter (¼) Section Thirty-six (36) Township Eight (8) South, Range Six (6) East."

"You are further notified that such connection is reasonably practicable, can be put in with safety and that the said J. K. Dering Coal Co. will furnish sufficient business

to said Cleveland, Cincinnati, Chicago and St. Louis Railway Company to justify the construction and maintenance of said switch track."

(Signed) J. K. Dering Coal Co., by James B. Pauley, Vice-President.

Item 7: January 21, 1924, letter Clarence B. Cardy to H. A. Worcester, enclosing written application of J. K. Dering Coal Company for connection of spur-track of the Coal Company constructed from its mine No. 2, to the right-of-way of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company in Raleigh Township.

Application dated January 18, 1924, directed to The Cleveland, Cincinnati, Chicago & St. Louis Railway Company for connection between tracks of the Railway Company and private side-track and spur-track of Coal Company in Raleigh Township for purpose of serving mine of J. K. Dering Coal Company and notifying Railway Company that the Coal Company desires said switch connection with said tracks of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company at a point where the right-of-way of The Cleveland, Cincinnati, Chicago & St. Louis Railway joins the following described lands, to-wit:

"A tract of land lying between the tracks of the Southern Illinois Railway and Power Company and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, in the west half of the southwest quarter of Section Thirty-six (36), Township Eight (8) South, Range Six (6) East of the Third Principal Meridian, Saline County, Illinois, more particularly described as follows:

[fol. 391] "Beginning at a point on the west line of said Section 36, 643 feet South of the Northwest corner of the southwest quarter of the southwest quarter of said Section 36; thence south on said Section line 638 feet to the north right of way line of the said C. C. C. & St. L. Ry. Co.; thence north 49 degrees and 15 minutes east on the north right of way line of the said C. C. C. & St. L. Ry. Co. 1,729 feet to a point on the quarter section line between the Southwest Quarter (S. W. ¼) Southwest Quarter (S. W. ¼) and the Southeast Quarter (S. E. ¼) Southwest Quarter (S. W. ¼)

of the said Section 36; thence north on the quarter section line 556 feet to a point on the south right of way line of the said Southern Illinois Railway and Power Company right of way; thence south 51 degrees 39 minutes west along the said south right of way line of the said Southern Illinois Railway & Power Company right of way 1,675 feet to the point of beginning, containing 17.86 acres, more or less."

"You are further notified that such connection is reasonably practicable, can be put in with safety and that the said J. K. Dering Coal Co. will furnish sufficient business to said Cleveland, Cincinnati, Chicago and St. Louis Railway Company to justify the construction and maintenance of said switch track; that the said private side track and spur track of the J. K. Dering Coal Co. has been constructed and is now ready for service and operation; that said J. K. Dering Coal Co. is now ready, willing and able to furnish business for hand-ing over your railroad and does hereby tender you such business for handling to points of destination in the States of Illinois, Indiana, Iowa, Wisconsin and other States; that your failure or refusal to construct said track connection and to receive and handle such business will result in great loss and damage to the undersigned company.

"The above and foregoing notice is given in accordance with Section 1 of the Federal Act to Regulate Commerce."

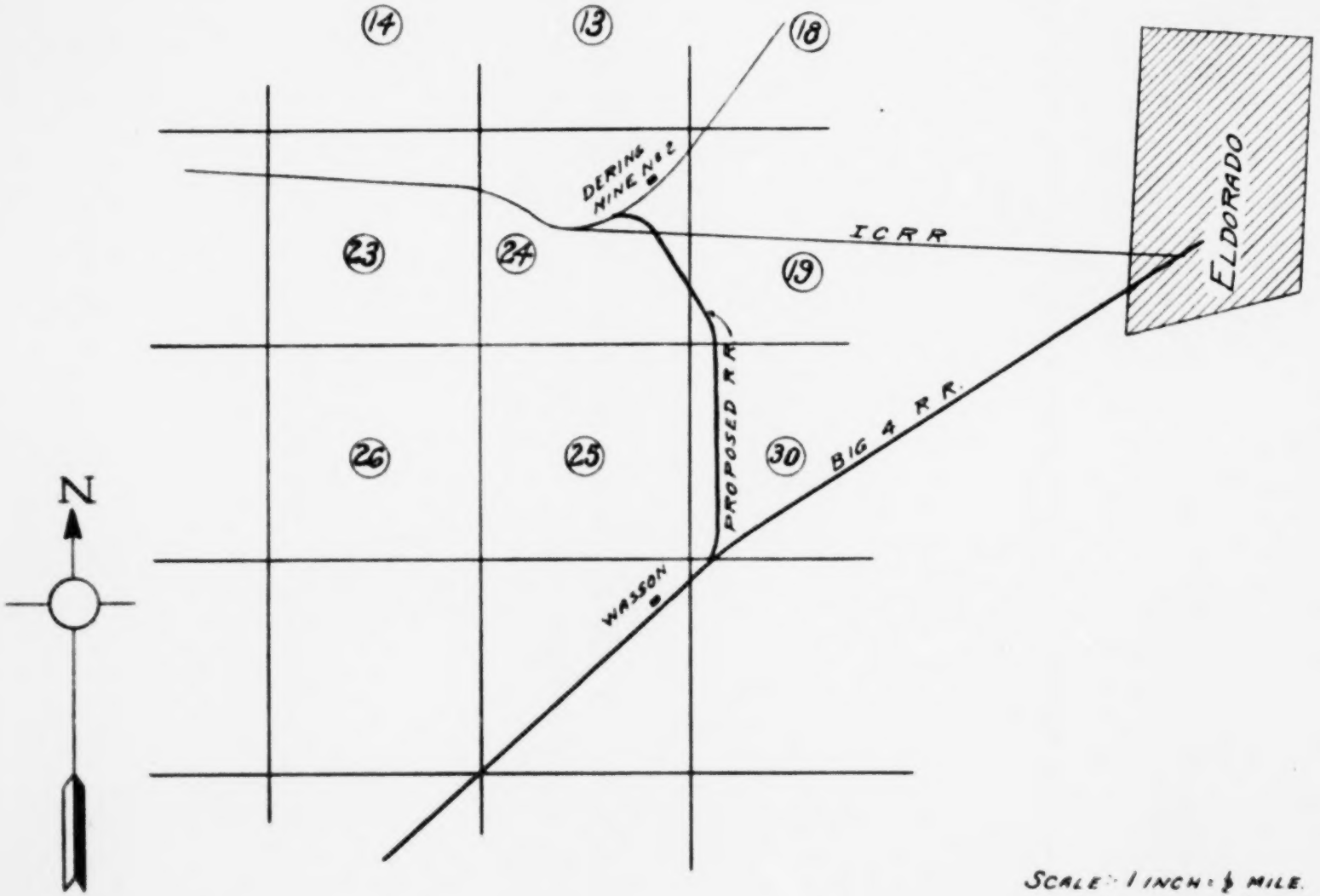
(Signed) J. K. Dering Coal Co., by James B. Pauley, Vice-President.

[fol. 392] EXHIBIT No. II

Copy of Letter, James R. Gaynor to J. B. Pauley, dated July 24, 1919:

"Mr. Herman, Chief of party of B/4 Survey Corps has been at work on proposed connection for No. 2 Mine since the 21st, working from the other end and reached our Mine No. 2 today.

"To facilitate their work we have furnished them copy of our track layout, saving them the time of surveying the detailed arrangement of our yard, as they seem to be in a special hurry on this work, having been impressed by the


14
13
18
DERING NINE No 2
ICRR
ELDORADO
23
24
19
PROPOSED R R
BIG 4 R R.
26
25
30
WASSON
N
SCALE: 1 INCH = ½ MILE.
JULY 24, 1919

B&O Rail Road
Sept 1923

Oct 1923

Top of Rail Elev 100.0

Rail Elev 100.0 Elev 100.0

Sta 31+50 Elev 99.0

Sta 31+50 Elev 99.0 Top of pavement Culvert

Sta -31+ RCP

-1.0%

3003

Sta 32+ Elev 99.2

Double Line 60"x40" RCP

3003

+1.5%

4003

E. Hornbaker Pcls Sta 51+39.0

+1.9%

1:50

-1.0%

4040

32-30" RCP

+1.5%

Sta 0+00

Sta 0+00 Elev 100.0 Top of pavement Culvert

Sta 0+00 Elev 100.0 Top of Rail Elev 100.0

J.K. Dering Coal Co
East of S line

D. 3700
D. 3700

To Eldorado 0.32 ft

To Mt Morris

To Mt Morris

To Mt Morris

Oct 1923

Nov 1923

E. Hawkesbury Rd. Sta. 11+32.0

Sept 0 11+44 BCP

E. Prospect Road Sta. 7+42 BCP

1574

1585

1580

1560

1570

1565

1575

1585

1580

1565

1575

1585

1580

1565

1575

1585

1580

0504 Rail Laid Main Track

Dec 1923

0504 Jan. 1924 Siding Rail Laid Jan. 1924

E Public Road

R H Boomhower

B F Davis

R Moore

J K Dering Coal Co

E C C & St L Passing Track

90 100 110 120 130 140 150

Jan. 1924
8304 siding Railroad
Jan. 1924

E.S.I.R&P Electric Line 138+885

P.S. Sta 147+65.6 Elev. 367.18 Top of Rail S.C. C&SIL Passing Track

1600
1615
1625
1640
1650
1660
1665

B.E. Davis

D.S. 4°
Δ 18°25'

P.T. Sta 150+50.4

P.C. Sta 151+10.4 Elev. 367.10

P.T. Sta 156+17.4
P.C. Sta 156+27.5

P.S. Sta 161+65.6

10°-30' CCP

R. Moore

C.C.C.&St.L. Passing Track

J.K. Dering Coal Co.

120
120
120

ELDORADO SALINE CO ILLINOIS
PROFILE OF
REVISED "L" LOCATION
FROM DERING MINE 3 MILES WEST OF
ELDORADO TO CONNECTION WITH C.C.C.&St.L
ELDORADO, ILL. NOV 15 1923

Scales - Hor 1" = 400'
Vert 1" = 20'

L.M. Gardner

8504 Rail Load
Sept 1923

Oct. 1923

Top of Rail Elev 400.00

Rail 70 lbs A.S.C.E.
Std 75-30 Relay Location of present Curve

Sta 0+00

0+00

-1.0%

3903

PT Sta 12+18.8 Elev 398.2

0.0%

Double Line 60'x16.0 "RCP

3903

+1.5%

4003

E. Harrisburg Pike Sta 5+14.50

4150

-1.0%

4040

St -30"RCP

+1.1%

400

To Aldorado

To Pekin Mine

J.K. Dering Coal Co
East of ℄ sec. Line

D. 9°00'
Δ. 37°04'

N. Thomas

P.A. Johnson

E. Harrisburg Rd

E. Public Road

R. Bramlett

W.R. Joiner

00

10

20

30

40

50

0504 Rail Laid Main Track

Nov 1923

Dec 1923

24°-36" RCP
E. Public Road Sta. 101+55.0

E. Private Road Sta. 74+85.0

Super-0

R 44°-44" RCP

L 11°-10" RCP

E. Public Road

E. Private Road Sta. 96+65.2

P.C. Sta. 96+65.2

P.T. Sta. 97+08.3

E. Public Road

E. Private Road Sta. 87+53.2

E. Private Road Sta. 74+85.0

J.N. Thomas

J.N. Thomas

R.H. Bramlett

W.P. Skinner

E. Moore

3945

3925

3935

3940

30

40

50

60

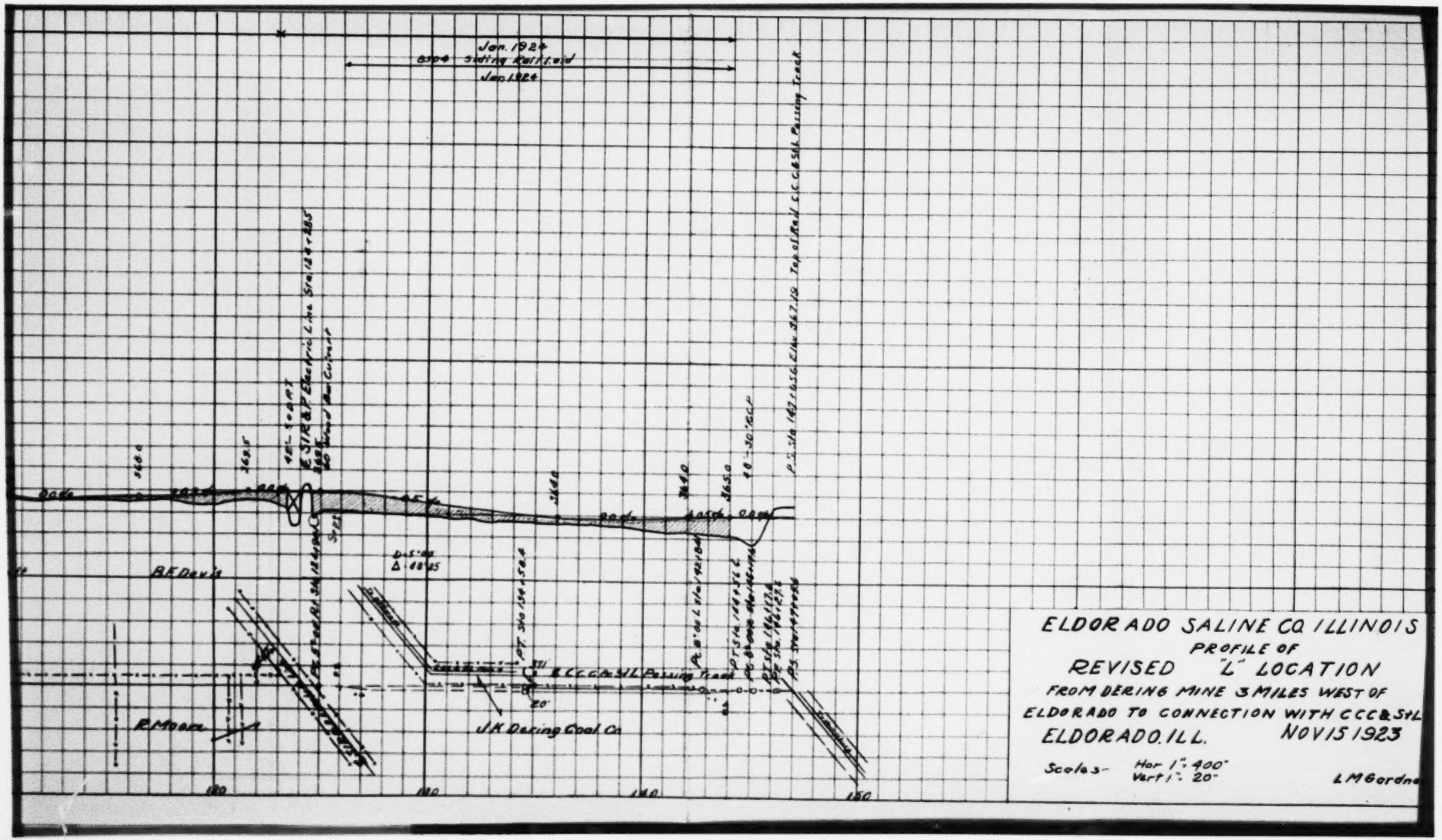
70

80

90

100

110


Jan. 1924
open siding Railroad
Jan. 1924
B.E. Davis
R. Moore
J.K. Dering Coal Co
ELDORADO SALINE CO ILLINOIS
PROFILE OF
REVISED "L" LOCATION
FROM DERING MINE 3 MILES WEST OF
ELDORADO TO CONNECTION WITH CCC&StL
ELDORADO, ILL.
NOV 15 1923
Scales- Hor 1" = 400'
Vert 1" = 20'
L M Gordon

To Harrisburg

DERING COAL CO

3 J R A I L R O A D

R MOORE

R.H BRAMLET

R MOORE

RAPP BROS

B F DAVIS

B F DAVIS

R H BRAMLET

E Walker Road

E Public Road

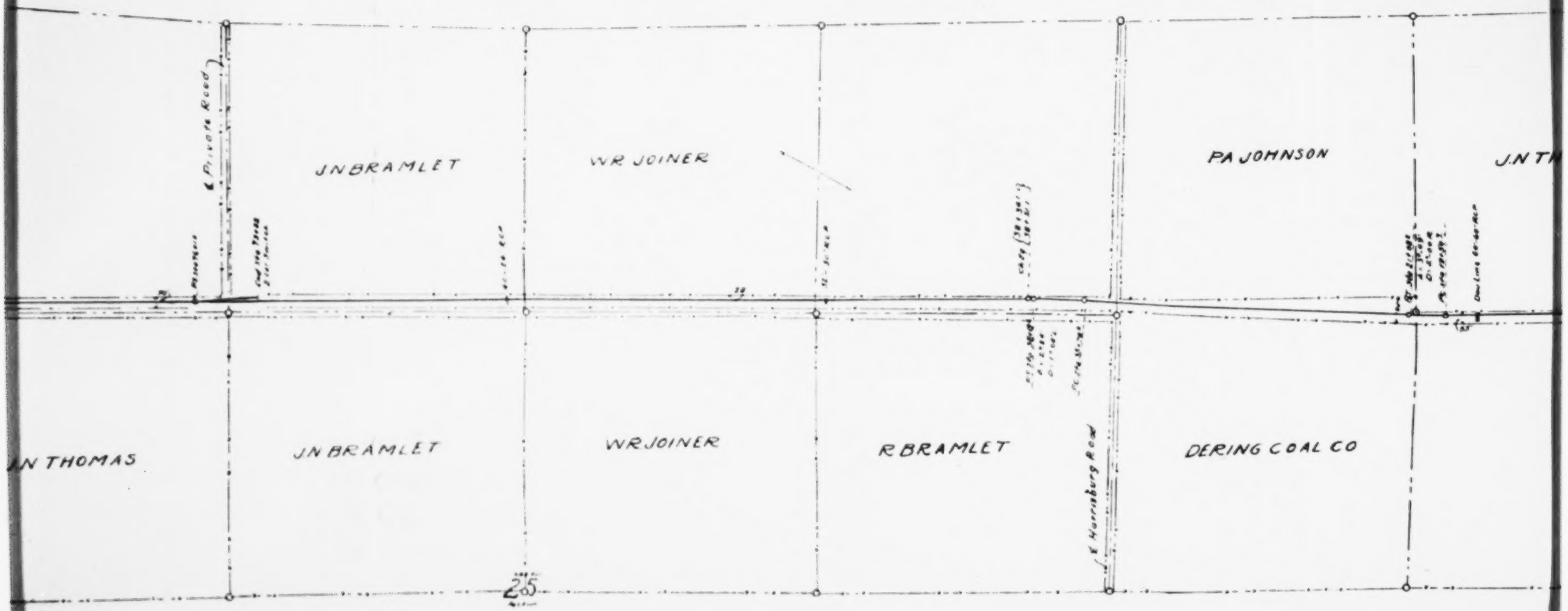
J N

36

To Lloydroo

FRO

C C



MAP

SHOWING DERING MINE CO'S. TRACK
M THEIR MINE NO. 2 .TO CONNECTION WITH
C. & ST. L. R.R. CO. NEAR ELDORADO ILL.

SCALE 1"= 400'

FEB. 5, 1924.

W.R. JOINER

P.A. JOHNSON

J.N. THOMAS

H. SPENCE

TO ST. LOUIS

W.R. JOINER

R. BRAMLET

E. Harrisburg Road

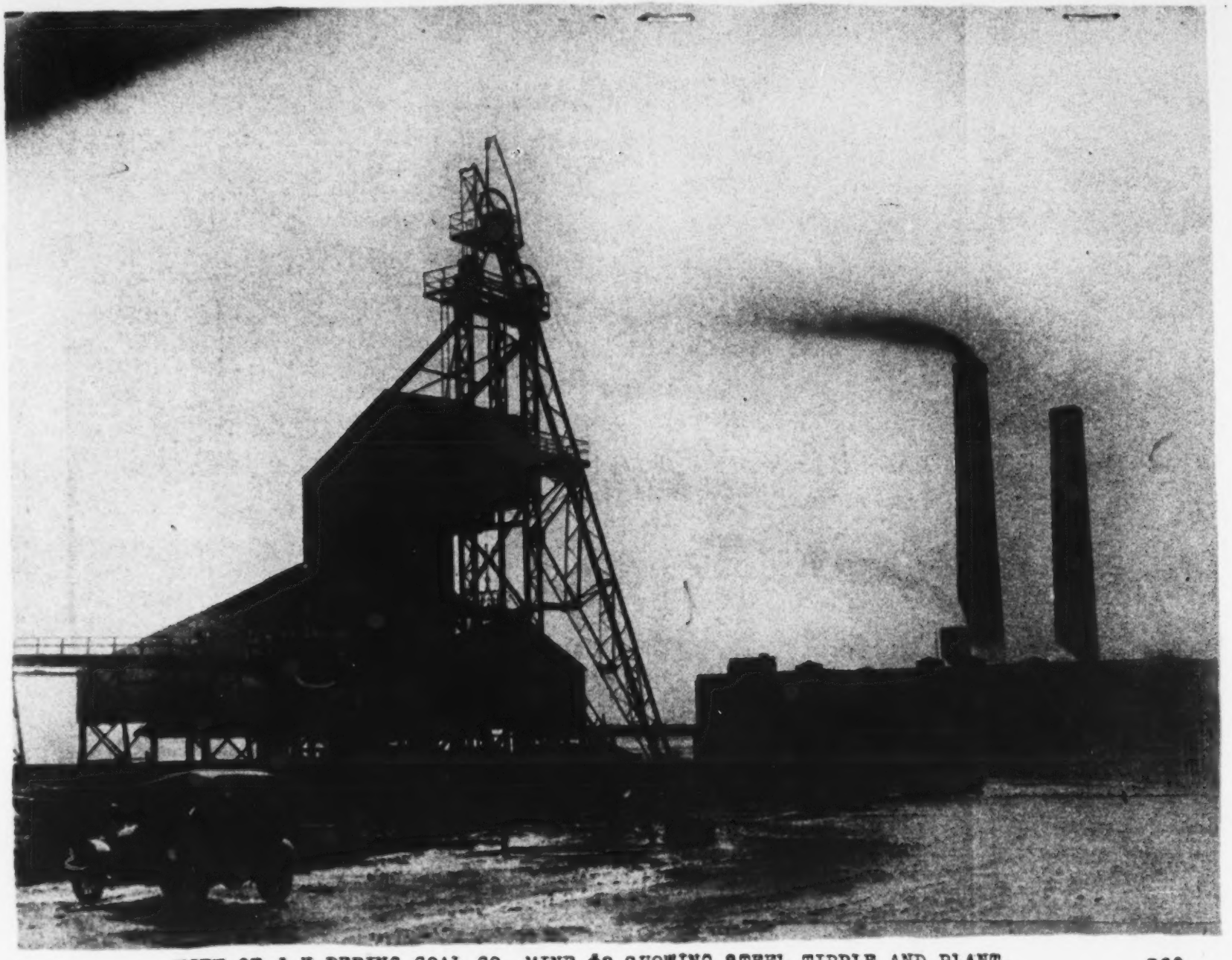
DERING COAL CO

204

DERING COAL CO

CK
N WITH
DO ILL.
924.

VIEW OF DERING MINE NO. 2, SHOWING TIPPLE AND PLANT WITH NEW EXTENSION OF POWER HOUSE.



VIEW OF J.K.DERING COAL CO. MINE #2 SHOWING STEEL TIPPLE AND PLANT.

399

VIEW OF CROSSING OF NEW SWITCH TRACK WITH I. C. R. R. MAIN LINE LOOKING SOUTHWESTERLY.

COPY BOUND CLOSE IN CENTER

VIEW OF NEW SWITCH TRACK CROSSING I.C.R.R. MAIN LINE AND SHOWING

NORTH END OF COMPLAINANT'S NEW SWITCH TRACK APPROACHING CROSSING WITH I. C. R. R. MAIN TRACK.

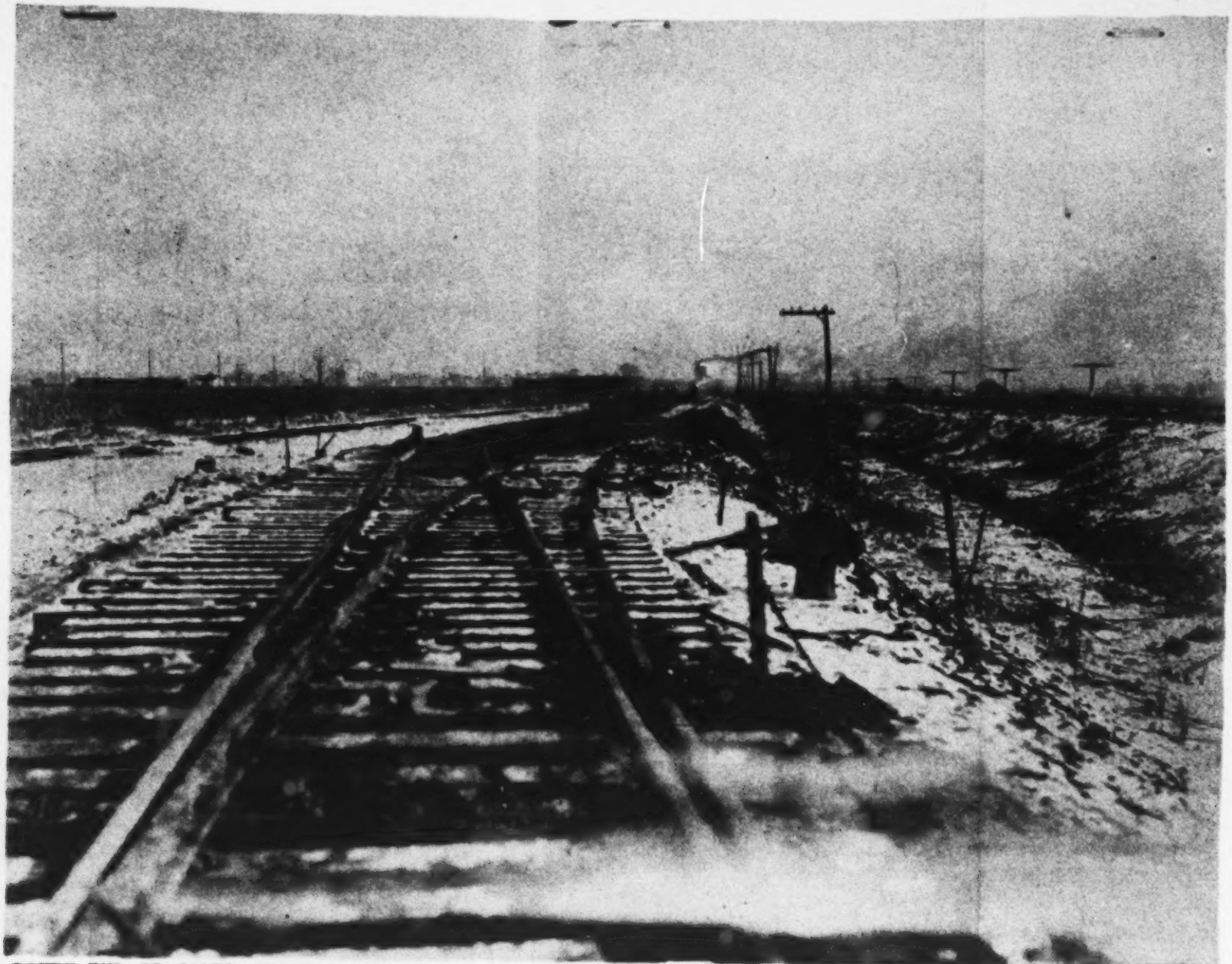
VIEW OF NEW SWITCH TRACK, LOOKING NORTH.

COPY BOUND CLOSE

N CENTER

VIEW OF NEW SWITCH TRACK, LOOKING NORTH.

VIEW OF CROSSING OF NEW SWITCH TRACK WITH TRACK OF S.I.R.& P.CO., TAKEN FROM SIR&PCO. TRACK, LOOKING SOUTH.



SOUTH END OF COMPLAINANT'S NEW SWITCH TRACK, SHOWING STORAGE TRACK AT LEFT; ALSO SHOWING TRAIN IN OPERATION ON THIS TRACK AT EXTREME LEFT OF PICTURE.

408

VIEW TAKEN FROM BIG FOUR TRACK, LOOKING NORTH AND EAST, SHOWING POINT OF PROPOSED CONNECTION BETWEEN NEW SWITCH TRACK AND BIG FOUR RAILROAD. TRAIN IN OPERATION ON NEW TRACK IN BACK-GROUND.

409

EXTREME SOUTH END OF NEW SWITCH TRACK SHOWING I. C. CAR 126702, LOADED WITH COAL FROM DERING MINE NO. 2, TENDERED THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY BY J. K. DERING COAL CO., ON FEBRUARY 9th, 1924, FOR BILLING AND MOVEMENT TO INDIANAPOLIS, INDIANA, VIA BIG FOUR.

SOUTH END OF COMPLAINANT'S TRACK, LOOKING TOWARD BIG FOUR TRACK, AT POINT OF PROPOSED CONNECTION.

instructions received from the Main Office that this work was especially important.

"I am enclosing a sketch showing the proposed route that they have surveyed, showing the connection, approximately one quarter mile northeast of Wasson shaft, making approximately one and one-half miles of track." (Map attached.)

(Here follows map marked side folio page 393)

[fol. 394] STATEMENT RE EXHIBIT NO. III

Receipt from post office at Chicago showing receipt of registered letter dated 22nd day of January, 1924.

[fol. 395] EXHIBITS NOS. IV AND V

Blue-print and Profile of Proposed Track

(Here follow reproductions of the above, marked side folio pages 395a and 395b)

[fol. 396] EXHIBIT NO. VI

Fourteen (14) photographs of the proposed track and plant.

(Here follow photographs, marked side folio pages 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410)

[fol. 411] STATEMENT RE EXHIBIT NO. VII

Itemized statement of cost of construction of track, showing complete statement of work and service beginning December, 1922, to January, 1924, showing an aggregate $87,676.20 and containing a statement as follows:

"According to the estimate, there is still due the Illinois Central $10,000.00, in addition to the above. This of course

is an estimate and whether it will be $10,000.00, or more or less, is not possible to say."

[fols. 411a–419] STATEMENT RE EXHIBIT VIII

An agreement, dated 20th day of December, 1922, between Illinois Central Railroad Company, party of the first part, and J. K. Dering Coal Company, a corporation, party of the second part.

(This is omitted from the evidence and referred to as quoted in the petition or bill herein, pages 23 to 35.)

[fol. 420] EXHIBIT No. X

Map showing location of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and Illinois Central Railroad.

(Here follows map, marked side folio page 421)

[fol. 422] EXHIBIT No. XI

Plat showing main and original line of the *the* Cleveland, Cincinnati, Chicago & St. Louis Railway Company and C. & E. I. in Franklin, Williamson, and Saline counties, with mine located in Saline and Franklin counties on respective railroads and some of the mines located on the Illinois Central.

(Here follows plat, marked side folio page 423)

[fol. 424] EXHIBIT No. XII

Brief of Miley & Combe and Clarence B. Cardy in Illinois Commission case in the Circuit Court of Saline County, pages 45-61, Commission's orders entered May 8 and May 3,

MAPS

TOO

LARGE

FOR

FILMING

PLAT SHOWING
MAIN AND BRANCH LINES
OF
I.C., C.C.C.&ST.L. AND C.&E.I. R.RS.
IN
FRANKLIN, WILLIAMSON
AND
SALINE COUNTIES

1923, by Illinois Commerce Commission, which orders are as follows:

[fol. 425] By the COMMISSION:

On November 25, 1922, the Illinois Central Railroad Company, the Southern Illinois Railway & Power Company and the J. K. Dering Coal Company filed a joint petition for permission to extend a mine lead track from Dering Mine No. 2 of the said coal company at grade across the main tracks of the said railroad companies, and across three public highways, all in Raleigh Township, Saline County, Illinois, to a connection with a certain side track of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, as shown diagrammatically by solid red lines on a certain blueprint dated November 22, 1922, attached to the said petition and made a part thereof.

The petition sets forth that said Mine No. 2 is located about two and one-half miles west of the City of Eldorado immediately north of the main track of the Illinois Central Railroad Company, that the said mine lead track extending southerly therefrom will be about two miles long and is being constructed for the purpose of furnishing an outlet for coal shipments to points south, and that the parties hereto have agreed among themselves as to the manner in which the said railroad crossings shall be constructed as well as the expense thereof, the entire cost of the construction of the said track and each crossing protection as may be necessary to be borne by the J. K. Dering Coal Company. [fol. 426] The crossing of the said lead track with the main track of the Illinois Central Railroad Company is located about the center of Section 24, while the crossing of the said lead track with the main track of the Southern Illinois Railway & Power Company is located about the center of Section 36.

On November 26th the proposed railroad crossings and the proposed highway crossings were viewed by a number of the engineering section of the Commission in company with representatives of each of the interested parties and the report submitted indicates that it is practical to construct and operate the said mine lead track in the manner set forth in the petition; that the train operation on the said lead track will consist of switching movements back

and forth between the said mine and the connections with the various railroads involved herein; that probably there will not be more than two or three such movements per day; that train movements on the Illinois Central Railroad consists of the operation of freight trains and local passenger trains, while movements on the main line of the Southern Illinois Railway & Power Company consists of the operation of interurban passenger cars about one car each way every hour; that the said railway and power company desires some form of interlocking protection at the crossing of its main track with the said mine lead track in order to avoid the necessity of stopping its cars at the crossing, while the Illinois Central Company proposes, for the time being at least, to stop all of its trains at the proposed crossing of the said mine lead track with its main track in order to obviate the necessity of installing interlocking protection which would otherwise be necessary; that the physical surroundings at the proposed crossings between Sections 24 and 25 and between Sections 25 and 26 are each as to require special crossing protection, the view at these crossings being badly obstructed; and, that the parties hereto have agreed among themselves as to the manner of crossing in each case, the protection necessary, and the expense involved.

[fol. 427] The petition in this matter is accompanied by a statement dated December 1, 1922, and signed by C. E. Whitlock, Highway Commissioner of Raleigh Township, granting authority to the J. K. Dering Coal Company to extend its mine lead track at grade across three public highways at grade in the said township as follows:

(a) An east-and-west public highway known as the Eldorado-Harrisburg Road on the line between Sections 24 and 25;

(b) an eastand west public highway on the line between Sections 25 and 26; and

(c) an east-and west public highway known as the Wasson-Harrisburg Road on the center line of the North half of Section 36;

all of these crossings being approximately midway east and-west of the said sections.

Accompanying the petition also is a statement dated

December 8, 1922, and signed by the J. K. Dering Coal Company and the Southern Illinois Railway & Power Company setting forth that the latter company consents to the installation of the proposed crossing to be formed by the intersection of their tracks near the southerly end of the proposed mine switch in Section 36, and that the said parties here reached an aggreement relative to the installation and expense of such protection as the Commission may deem necessary at the said crossing, a preference being expressed for swinging crossing gate protection, however. Certain contracts were put in evidence between the Illinois Central Railroad Company, Southern Illinois Railway and Power Company and J. K. Dering Coal Company relative to the use of the use of the mine lead track. While this Commission will not presume to construe the contracts or declare them ineffective, yet the permission contained in this order to construct the mine lead track in question will limit the uses to be made of that track to those ordinarily appurtenant to a lead track to a mine until the further order of this Commission in a proper bearing.

The Commission having given due consideration to the petition in this case, and having caused the said proposed [fol. 428] railroad crossings at grade to be viewed as required by law, and after full investigation and with due regard to the safety of life and property, is of the opinion and finds that the construction of the said mine lead track is necessary in order to facilitate the movement and distribution of coal cars to and from Dering Mine No. 2 and to increase the output thereof; that the installation of the said crossings will not unnecessarily impede or endanger traffic or transportation upon the railroad to be crossed; that the parties hereto have agreed among themselves as to the construction of the said crossings, the right to cross, the matter of crossing protection, and the expense in connection therewith; that interlocking protection is unnecessary at the crossing of the said mine lead track with the main track of the Illinois Central Railroad Company; that the installation of a swinging crossing gate of an approved type should be installed at the crossing of the mine lead track with the main track of the Southern Illinois Railway & Power Company in order to avoid unnecessary delays to passenger cars on the latter's line of railway;

that the highway commissioner of Raleigh Township has given his consent in writing to the extension of the said mine lead track at grade across the three public highways enumerated above; and, that the prayer of the petitioners should be granted, but that the use of said track be for the uses ordinarily appurtinent to a mine lead track and for no other purposes until the further order of this Commission, notwithstanding contracts between the parties providing their consent for other uses.

It is therefore ordered that permission be, and the same is hereby, granted to the J. K Dering Coal Company to construct and maintain, or cause to be constructed and maintained, across the single main track at grade of the Illinois Central Railroad Co. a mine lead track for the purpose of serving the J. K. Dering Coal Company in the operation of its coal mines, at a point about two and one-half miles west of the City of Eldorado near the center of Section 24 in Raleigh Township, Saline County, Illinois, [fol. 429] as shown diagrammatically to the petition in this case and made a part thereof, and thereafter to operate its engines and cars thereover.

Nothing herein is intended to waive any requirements of Section 12 of an Act entitled "An Act in relation to fencing and operating railroads," approved March 31, 1874, in force July 1, 1874 (Hurd's revised statutes 1913, ch. 114, Secs. 63-76).

It is further ordered that permission be, and the same is hereby, granted to the J. K. Dering Coal Company to construct and maintain, or cause to be constructed and maintained at grade, across the single main track of the Southern Illinois Railway & Power Company, a mine lead track for the purpose of serving the J. K. Dering Coal Company in the operation of its coal mines, at a point about three and one-half miles southwest of Eldorado, near the center of Section 36, Raleigh Township, Saline County, Illinois, as shown diagrammatically on a certain blueprint dated September 22, 1922, attached to the petition in this case and made a part thereof, and to operate its trains and cars thereover, the right to cross first having been secured as required by law.

It is further ordered that the Illinois Central Railroad Company and the Southern Illinois Railway & Power Company, be, and the same are hereby, permitted, authorized

and directed to install a swinging crossing gate of a type and pattern which shall meet the approval of the Commission, with red banners for day indication, and red lights for night indication, at the crossing at grade of the said mine lead track with the main track of the Southern Illinois Railway & Power Company herein authorized to be installed near the center of Section 36, Raleigh Township, Saline County, Illinois, about three and one-half miles southeast of Eldorado, and thereafter to operate and maintain the said devise until such time as the Commission may otherwise direct, for the purpose of protecting train movements over the said crossing, the said swinging crossing gate to be set normal for movements on the railroad of the [fol. 430] Southern Illinois Railway & Power Company.

It is further ordered that the Southern Illinois Railway & Power Company, within thirty (30) days from the date of service of this order, shall submit to the Commission for approval plans in triplicate showing in a general way the design and manner of installing the said swinging crossing gate herein authorized to be installed at the said crossing.

It is further ordered that the Southern Illinois Railway & Power Company shall notify the Secretary of this Commission, in writing, as soon as the said swinging crossing gate has been installed and is ready for operation so that an inspection may be made by the Commission before same is placed in service. If upon inspection the Commission finds that the said device is substantially constructed and will form adequate protection for the said crossing, the said railway and power company is hereby permitted and authorized to operate its cars and trains over the said crossing without stopping provided the said swinging crossing gate is properly set for movements on its main track and against trains on the said mine lead track.

It is further ordered that permission be, and the same is hereby granted to the J. K. Dering Coal Company to construct and maintain, or to cause to be constructed and maintained, at grade a mine lead track for the purpose of serving the J. K. Dering Coal Company across the three public highways in Raleigh Township, Saline Sounty, Illinois, as follows:

(a) An east-and-west public highway known as the Eldorado-Harrisburg Road on the line between Sections 24 and 25;

(b) An east-and-west public highway on the line between Sections 25 and 36;

(c) An east-and-west public highway known as the Wasson-Harrisburg Road on the center line of the north half of Section 36;

all of these crossings being approximately midway east-and-west of the said sections in which they are located, as shown diagrammatically on the said blueprint attached to the petition in this case, and thereafter to operate its engines and cars thereon.

[fol. 431] It is further ordered that the crossings thus formed shall be so constructed that the top of the track rails shall be flush and level with the top surface of the highways at the points of intersection; that each of the said crossings shall be full-planked between rails and as far as the ends of the ties outside thereof for distances of not less than eighteen (18) feet in width measured at right angles to the center lines of the said highways; that the top of the planking in the said crossings shall be flush with the top of rails and present a reasonably smooth surface for highway traffic, and shall be maintained thereafter in that condition; that the highway approaches to the said highways within twenty-five (25) feet from the center line of track shall be maintained with top surfaces at least (18) feet in width; that such openings shall be constructed and maintained underneath the roadbed at each of the said crossings as may be necessary in order to furnish proper drainage; and, that such crossing protection as is required by law or by order of this Commission.

It is further ordered that the crossing of the mine lead track herein permitted to be constructed by the J. K. Dering Coal Company, with the tracks of the Illinois Central Railroad Company and the tracks of the Southern Illinois Railway and Power Company, are hereby declared to be railroad crossing at grade subject to all of the laws of the State of Illinois relative to the protection of grade crossings of railroads by interlocking devices or other protective measures as this Commission may find necessary

for the protection of the public at such grade crossings, and said railroad crossings at grade, if constructed, by the J. K. Dering Coal Company are constructed under this condition and no other.

It is further ordered that the Illinois Central Railroad Company and the Southern Illinois Railway and Power Company shall make report to the secretary of the Commission, in writing, the date upon which the said mine lead track is fully constructed across its main track and that of the Southern Illinois Railway and Power Company, and [fol. 432] across the three highways in Raleigh Township, Saline County, referred to above, and shall mail such report, or reports, to the said Secretary not later than five (5) days after the completion of the work.

The parties hereto having agreed among themselves as to the expense in connection with the installation of the crossings herein involved, no order is entered at this time with respect thereto, but the Commission retains jurisdiction over the subject matter and the parties hereto for the purpose of entering any further orders as in its opinion public interest or convenience may require.

By order of the Commission at Springfield, Illinois, this third day of May, 1923.

(Signed) Julius Johnson, Secretary.

[fol. 433] By the Commission:

On December 27, 1922, under Docket Number 12891, the J. K. Dering Coal Company, an Illinois corporation, filed its petition seeking a physical switch track connection with the tracks of the defendant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and a coal mine spur track to be constructed by the coal company from its Mine No. 2 near Eldorado, Saline County, Illinois, to the railroad right-of-way of the defendant. The application was filed under Section 45 of the Illinois Commerce Commission law and Section 5, Article 13, of the Constitution of 1870.

The evidence shows that the complainant owns about 3,600 acres of coal lands, containing approximately 29,000,000 tons of coal, north of and adjacent to the main line of the defendant, near the city of Eldorado, Saline County, Illinois. The hoisting shaft of the mine operated

by the complainant is located about three miles north of the railroad right-of-way of the defendant and is capable of producing 3,500 to 4,000 tons of coal per day. The only outlet for the coal produced by the complainant is over the branch line of the Illinois Central Railroad Company operating between Duquoin, Illinois, and Eldorado, Illinois. The evidence shows that this outlet is wholly inadequate to take cars of the large normal production of coal at this mine and that there is an absolute necessity for a direct [fol. 434] connection with the tracks of the defendant in order to permit the complainant to ship and market the coal that it produces at this mine. The evidence further shows that the complainant contemplates the construction of a mine spur track leading from its mine to the right-of-way of the defendant at the sole expense of the complainant; that there are a large number of markets located along the line of the defendant and its connecting carriers, to which the complainant desires to ship coal produced at said mine and deliver same for shipment to the defendant over said switch track, and that many of the markets in question are now inaccessible to the complainant over the branch line of the Illinois Central Railroad Company. The evidence further shows that the complainant has made repeated requests upon the defendant for the construction of a spur track leading from its mine, as well as a physical track connection with the tracks of that company, but for some reason not clearly explained in this record, the defendant has refused to permit the physical connection with the proposed track to be constructed by the complainant and its tracks, although under date of November 1, 1921, Mr. W. T. Stevenson, General Freight Agent of the defendant, signified the willingness of his company to make the physical connection asked for by the complainant in the following language:

"Referring to our conversation in Chicago on September 14th, at which time you brought up the question of the Big Four affecting track connection with Dering Mine No. 2, located on the Illinois Central near Eldorado:

"This question has been given the most careful consideration. If your Company care to construct and maintain at your own expense a track from your mine up to our line, we will be glad to effect connection with such track, the

point of connection, of course, to be designated by our Operating Department.

The evidence shows that the complainant has acquired a right-of-way from its mine to the right-of-way of the defendant, and that it will construct upon such right-of-way, at its sole expense, a mine switch track of the kind, quality and standard that is ordinarily in use and operation along the line of the defendant and other coal-carrying lines in the State of Illinois. The record shows that it would cost the defendant $2,080.00 to construct a track to extend from [fol. 435] the point of switch to the right-of-way of the line of the defendant. The complainant has also offered to pay the cost of connecting its track with the tracks of the defendant.

It is also shown by the evidence that a physical connection can be made with said proposed track of the complainant and the tracks of the defendant which would be reasonable and practicable, and installed and used without materially increasing the hazard of the operation of the railroad of the defendant, and that the business which may reasonably be expected to be received by the defendant from the complainant over such switch track connection is sufficient to justify the expense of connecting said switch track of the complainant with the tracks of the defendant railroad company, and that the complainant owns and operates a coal bank within the meaning of Section 13, Article 5, of the Constitution of 1870.

The record in this case shows that the complainant has an investment in its coal mining property of more than $1,600,000 and that a large portion of the coal produced at this mine, to be shipped over the tracks of the defendant, is ready for shipment, and that upon the construction of this proposed connection there will be sufficient coal ready for shipment to furnish the defendant in the neighborhood of ten to twenty cars per day and will result in a substantial revenue to the defendant. The complainant is also ready, able and willing to make such fair and reasonable arrangements for the payment of the expense of the construction and maintenance of such switch connection with the rails of the defendant as this Commission may deem just and reasonable.

The evidence and proof in this case clearly sustain the

allegation of the complaint, and the complainant, under the law in this proceeding, is entitled to have provided for it a switch track connection with the tracks of the defendant for the purpose of shipping coal from its mine near Eldorado, Illinois, over the railroad of the defendant.

The defendant contended that the application for a track connection should be denied for the reason that the com- [fol. 436] plainant had entered into contracts with the Illinois Central Railroad Company and the Southern Illinois Railway and Power Company, both common carriers, permitting said companies to use said track, and that said common carriers would use said track to invade the territory of the defendant and take from it certain business which it is now handling. The mere fact that the complainant has entered into a contract permitting these common carriers to use the track when constructed is no defense to this application. Complainant, under Docket Number 12819, sought permission to construct a mine track across the Illinois Central and the Southern Railway and Power Company tracks, and the Commission in its order of May 3, 1923, in Cases 12819 and 12891 consolidated, specifically limited the use of said track as follows:

"While this Commission will not presume to construe the contracts or declare them ineffective, yet the permission contained in this order to construct the mine lead track in question will limit the uses to be made of that track to those ordinarily appurtinent to a lead track to a mine until the further order of this Commission in a proper hearing."

It was also contended by the defendant that this Commission has no jurisdiction to require such a connection, such jurisdiction being vested by the Transportation Act in the Interstate Commerce Commission, and that the proceeding was an effort to obtain additional cars and that the jurisdiction in relation to car supply was exclusively invested in the Interstate Commerce Commission. Both of these contentions under the evidence in this case are without merit.

The Commission having fully considered all of the evidence adduced and the representations and arguments made by both parties herein, and being fully advised in the premises, finds that the Commission has jurisdiction of the par-

ties and the subject matter in the above entitled cause, that the complainant made application to the defendant for a switch track connection as prayed for in the petition, and that the defendant has refused to provide such connection or spur; that the complainant is entitled to have the same provided for it; that the complainant is a contemplated shipper of freight over the railroad of the defendant and contemplates the construction of a mine switch track from its mine to the right-of-way of the defendant and is entitled to have said switch track connected with the tracks [fol. 437] of the defendant for the purpose of delivering carload shipments of freight to the defendant; that such connection is reasonable, practicable and can be installed and used without materially increasing the hazard of the operation of the railroad of the defendant, and that the business which may reasonably be expected to be received by the defendant from the complainant from such switch track connection is sufficient to justify the expense of such connection to the defendant railroad company.

The Commission further finds that the complainant owns and operates a coal bank within the meaning of Section 5, Article 13, of the Constitution of 1870, of Illinois.

The Commission further finds that the cost of constructing said switch track and spur track connection, on the right-of-way of the defendant, should be paid and borne by the defendant, and that the cost of connecting said track so constructed by the defendant, with the track to be constructed by the complainant, be borne and paid by the complainant. For the reasons above stated the Commission finds that the prayer of the petitioner should be granted.

The Commission further finds that in conformance with its order of May 3, 1920, in Cases 12819 and 12891, consolidated, the spur track connection herein permitted and ordered to be made by the defendant shall not be used for any other purpose than to serve the mine of the J. K. Dering Coal Company, petitioner herein, until the further order of the Commission in a proper proceeding.

It is therefore ordered by the Commission that the prayer of petitioner, filed under Docket Number 12891, be, and the same is hereby, granted.

It is further ordered that the defendant, within sixty (60) days of the date of this order, construct, maintain and

operate on its own right-of-way in the West Half (W. ½) of the Southwest quarter (S. W. ¼) of Section thirty-six (36) Township eight (8) South Range six (6) East of the Third Principal Meridian a switch connection and connecting track leading to the property and to the proposed track of the complainant, to be constructed on the property of the [fol. 438] complainant near the East line of the said West half (W. ½) of the Southwest quarter (S. W. ¼) Section thirty-six (36) Township eight (8) South Range six (6) East of the Third Principal Meridian, Saline County, Illinois, and to connect said switch connection and connecting track with the said proposed track of the complainant.

It is further ordered by the Commission that the cost of constructing said switch track and spur track connection on the right-of-way of the defendant shall be paid and borne by the defendant and that the defendant herein prepare and submit plans and specifications for such switch track connection on its right-of-way and a connection between said track and the track of the complainant, together with the reasonable cost of connecting said tracks, and that the same be filed with this Commission within fifteen (15) days from the date of this order and be submitted to the petitioner within said fifteen (15) days; that the cost of connecting said switch track connection to be constructed by the defendant, as herein ordered, with the proposed track of the complainant, shall be paid by the complainant herein.

It is further ordered by the Commission that the spur track connection herein ordered shall not be used for any other purpose than to serve the mine of the J. K. Dering Coal Company, petitioner herein, until the further order of this Commission in a proper proceeding. The Commission reserves the jurisdiction of the respective parties to the said matter hereof for the purpose of making any further order that may be necessary for the carrying out of its findings and order herein.

By order of the Commission at Chicago, Illinois, this 8th day of May, A. D. 1923.

(Signed) Julius Johnson, Secretary.

[fol. 439] EXHIBIT No. XIII

General Order No. 15 of the Railroad Administration under date of March 28, 1918, showing requirements that must be observed in respect to the construction, maintenance, and operation of new industrial tracks and in respect to the operation and maintenance of existing industrial tracks.

1. As to new industry tracks:

(a) The industry shall pay for, own and maintain that part of the track beyond the right of way of the railroad company;

(b) The railroad company shall pay for, own and maintain that part of the track on the right of way from the switch point to the clearance point;

(c) Generally speaking, an industry shall pay for and maintain, (although in special cases the railroad company may do so), and the railroad company shall own, that part of the track on the right of way from the clearance point to the right of way line;

(d) If the industry fails to maintain in reasonable safe condition the part of the track which it is required to maintain, the railroad company may disconnect the track or refuse to operate over it when not in such condition;

(e) The railroad company shall have the right to use the track when not to the detriment of the industry;

(f) The foregoing terms and conditions should be embodied in a written contract between the industry and the railroad company.

[fol. 440] 2. Where existing industry tracks are not covered by written contracts, they shall be maintained and operated in accordance with the provisions stated in paragraph 1 hereof.

3. Where industry tracks are covered by written contracts, such contracts shall be adhered to until otherwise ordered, but where any such contracts appear to work inequalities or injustice the circumstances should be brought

to the attention of the Regional Director, who will report thereon to the Director-General, if conditions seem to warrant.

4. The requirements of State Statutes and of State Commission in respect of the construction, maintenance and operation of industry tracks shall be complied with, but in cases where such compliance involves what appears to be an unreasonable burden upon the United States Railroad Administration the circumstances should be brought to the attention of the Regional Director, who will report thereon to the Director-General, if the conditions seem to warrant.

[fol. 441] EXHIBIT No. XIV

Statement showing potential operating time, time operated, time lost, giving causes, time shown in hours, October, November, and December, 1922, January and February, 1923; summary as follows:

October: Potential hours, 208, time operated 78½, time not operated 129½.

November: Potential 200 hours, operated 96 hours, not operated, 102 hours.

December: Potential 200 hours, operated, 97 hours, not operated 103 hours.

January: Potential 208 hours, operated 17¾ hours, not operated 137¼ hours.

February: Potential 192 hours, operated 80½ hours, not operated 111½.

[fols. 442 & 443] EXHIBIT No. XV

Statement showing potential operating time, time operated, time lost, giving causes, Dering Mine No. 2, August, 1923, to December, 1923, as follows:

August, 1923: Potential 216, hours worked 80, no market 120, no cars 16.

September, 1923: Potential 192, worked 88, no market 88, no cars 16.

October, 1923: Potential 216, hours worked 111½, no market 104, no cars ½.

November, 1923: Potential 200, hours worked 80, idle, no market, 120.

December, 1923: Potential 200, hours worked 88, idle, no market 112.

[fol. 444] AMENDED EXHIBIT #15

Statement Comparing Freight Rate on Bituminous Coal from Eldorado, Illinois, to Points in Illinois on the C., C., C. & St. L. Ry., with Through Combination Rates by Illinois Central and C., C., C. & St. L. Rys.

Column 1 To	From Eldorado, Ill., via C., C., C. & St. L. Ry., tariff I. C. 139-F, I. C. C. 27836, rate per ton	From Eldorado, Ill., via I. C. R. R. and C., C., C. & St. L. through combination, rate per ton	Lowest available rate from Dering No. 2, located on I. C. at Eldorado, to points shown in column 1
Cairo, Ill.	$1 24	$1 96	$1 23 S* 1 26 I*
Mound City	1 24	1 96	1 23 S* 1 26 I*
Olmstead	1 24	1 96	1 96
Levings	1 24	1 96	1 96
Grand Chain	1 23	1 95	1 95
Karnak	1 23	1 95	1 95
Belknap	1 23	1 95	1 95
Forman	1 23	1 95	1 95
Vienna	1 23	1 95	1 95
Bloomfield	1 23	1 95	1 95
Tunnel Hill	1 23	1 95	1 95
Parker	1 17	1 45	1 45
New Burnside	1 15	1 87	1 87
Stone Fort	1 12	1 84	1 84
Carrier Mills	1 01	1 73	1 73
Ledford	1 01	1 73	1 73
Harrisburg	95	1 67	1 67
Wasson	79	1 51	1 51
Eldorado @		25	25

Statement Comparing Freight Rate—Continued

Column 1 To	From Eldorado, Ill., via C., C., C. & St. L. Ry., tariff I. C. 139-F, I. C. C. 27836, rate per ton	From Eldorado, Ill., via I. C. R. R. and C., C., C. & St. L. through combination, rate per ton	Lowest available rate from Dering No. 2, located on I. C. at Eldorado, to points shown in column 1
Texas City	85*	1 57	1 57
Gossett	90	1 62	1 62
Norris City	90	1 62	1 62
Stokes	90	1 62	1 62
Brownsville	90	1 62	1 62

*S, State rate; I, Interstate rate.

[fol. 445] Carmi @	90	1 62	1 62
Simpson	90	1 62	1 62
Crossville	90	1 62	1 62
Calvin	90	1 62	1 62
Grayville	90	1 62	1 62
Cowling	91	1 63	1 63
Keensburg	91	1 63	1 63
Schrodte	96	1 68	1 68
Mt. Carmel @	96	1 68	1 68
Patton	97	1 69	1 69
Allendale	97	1 69	1 69
St. Francisville @	97	1 69	1 69
Billet	1 10	1 82	1 82
Lawrenceville @	1 12	1 84	1 84
Pinkstaff @	1 12	1 84	1 84
Birds	1 15	1 87	1 87
Flat Rock	1 15	1 87	1 87
Duncanville	1 15	1 87	1 87
Robinson @	1 24	1 96	1 71
Trimble @	1 25	1 97	1 97
Hutsonville	1 26	1 98	1 98
Coal Dock Switch	1 26	1 98	1 98
West York	1 26	1 98	1 98
Union	1 28	2 00	2 00
Walnut Prairie	1 28	2 00	2 00
Snyder	1 29	2 01	2 01
Ernst	1 29	2 01	2 01
Marshall	1 30	2 02	2 02

Statement Comparing Freight Rate—Continued

Column 1 To	From Eldorado, Ill., via C., C., C. & St. L. Ry., tariff I. C. 139-F, I. C. C. 27836, rate per ton	From Eldorado, Ill., via I. C. R. R. and C., C., C. & St. L. through combination, rate per ton	Lowest available rate from Dering No. 2, located on I. C. at Eldorado, to points shown in column 1
[fol. 446] Oliver	1 31	2 03	2 03
Paris @	1 33	2 05	2 05
Harris Spur	1 35	2 07	2 07
Wetzel	1 35	2 07	2 07
Horace	1 39	2 11	2 11
Edgar	1 44	2 16	2 16
Chrisman @	1 48	2 20	1 89
Scotts Switch	1 51	2 23	2 23
Woodyard	1 51	2 23	2 23
Ridge Farm	1 55	2 27	2 08
Vermillion Grove	1 72	2 44	2 44
Georgetown	1 75	2 47	2 47
Westville	1 78	2 50	2 50
Lyons	1 80	2 52	2 52
Danville @	1 83	2 55	2 55
Beckwith	1 83	2 55	2 55
Hilliary	1 83	2 55	2 55
Mission Mines	1 83	2 55	2 55
Oakwood	1 84	2 56	2 56
Bronson	1 84	2 56	2 56
Muncie	1 84	2 56	2 56
Fithian	1 84	2 56	2 56
Rumpler	1 84	2 56	2 56
Ogden	1 84	2 56	2 56
Glover	1 84	2 56	2 56
St. Joseph @	1 84	2 56	2 56
Mayview	1 86	2 58	2 58
Urbana @	1 87	1 86	1 86
Champaign @	1 87	1 86	1 86
Rising	1 87	2 59	2 59

Through combination rate shown above made up of I. C. R. R. distance rate 4 miles—72¢ per ton to Eldorado, [fol. 447] plus C., C., C. & St. L. Ry rate from Eldorado.

Statement Comparing Freight Rate—Continued

Column 1 To	From Eldorado, Ill., via C., C., C. & St. L. Ry., tariff I. C. 139-F, I. C. C. 37836, rate per ton	From Eldorado, Ill., via I. C. R. R. and C., C., C. & St. L. through combination, rate per ton	Lowest available rate from Dering No. 2, located on I. C. at Eldorado, to points shown in column 1
Mahomet	$1 87	$2 87	$2 87
Mansfield	1 89	2 99	1 95
Harris	1 89	2 99	2 99
Farmer City @	1 92	3 05	1 95
Watkins	1 92	3 09	3 09

Above through combination rate is composed of I. C. R. R. rate to Champaign, Ill., plus C., C., C. & St. L. Ry. [fol. 448] distance rate beyond.

Column 1 To	From Eldorado, Ill., via C., C., C. & St. L. Ry., tariff I. C. 139-F, I. C. C. 37836, rate per ton	From Eldorado, Ill., via I. C. R. R. and C., C., C. & St. L. Ry. through combination, rate per ton	Lowest available rate from Dering No. 2, located on I. C. at Eldorado, to points shown in column 1
Empire	$1 92	$3 05	$3 05
Le Roy @	1 92	2 99	1 95
Ford Woods	1 92	2 99	2 99
Downs	1 92	2 93	2 93
Gillum	1 92	2 93	2 93
Bloomington @	1 92	1 92	1 92
Twin Grove	1 92	2 83	2 83

Above through combination rate is composed of I. C. R. R. rate to Bloomington plus C., C., C. & St. L. Ry. distance [fol. 449] rate beyond.

Statement Comparing Freight Rate—Continued

Column 1 To	From Eldorado, Ill., via C., C., C. & St. L. Ry., tariff I. C. 139-F, I. C. C. 7836, rate per ton	From Eldorado, Ill., via I. C. R. R. and C., C., C. & St. L. through combination, rate per ton	Lowest available rate from Dering No. 2, located on I. C. at Eldorado, to points shown in column 1
Danvers	$1 92	$2 82	$2 82
Woodruff	1 92	2 78	2 78
Lilly	1 92	2 72	2 72
Potts	1 92	2 72	2 72
Mackinaw	1 92	2 72	1 92
Menert	1 92	2 72	2 72
Tremont	1 92	2 60	2 60
Leslie	1 92	2 50	2 50
Pekin	1 92	¢ 1 92	1 92
Peoria @	1 92	¢ 1 92	1 92
E. St. Louis	1 10	¢ 1 10	1 10
Madison	1 10	¢ 1 10	1 10
Granite City	1 10	¢ 1 10	1 10

Above through combination rate is made up of I. C. R. R. rate to Pekin plus C., C., C. & St. L. distance rate beyond [fol. 450] excepting —¢— I. C. R. R. through competitive rate.

Column 1 To	From Eldorado, Ill., via C., C., C. & St. L. Ry., tariff I. C. 139-F, I. C. C. 7836, rate per ton	From Eldorado, Ill., via I. C. R. R. and C., C., C. & St. L. through combination, rate per ton	Lowest available rate from Dering No. 2, located on I. C. at Eldorado, to points shown in column 1
Nameoki	$1 67	$2 21	$1 32
Mitchell	1 67	2 17	1 32
Livingston		2 40	2 40
Lake View	1 67	2 17	2 17
South Wood River	1 67	2 23	2 23
Wood River	1 67	2 23	1 32

Above through combination rate is made up of I. C. R. R. rate to E. St. Louis plus C., C., C. & St. L. Ry. distance rate [fol. 451] beyond.

Statement Comparing Freight Rate—Continued

Column 1 To	From Eldorado, Ill., via C., C., C. & St. L. Ry., tariff I. C. 139-F, I. C. C. 7836, rate per ton	From Eldorado, Ill., via I. C. R. R. and C., C., C. & St. L. Ry. through combination, rate per ton	Lowest available rate from Dering No. 2, located on I. C. at Eldorado, to points shown in column 1
Shelbyville	$1 84	$2 74	$2 74

Above through combination rate made up of I. C. R. R. rate to Pana, Ill., and C., C., C. & St. L. Ry. distance rate [fol. 452] beyond.

Column 1 To	From Eldorado, Ill., via C., C., C. & St. L. Ry., tariff I. C. 139-F, I. C. C. 7836, rate per ton	From Eldorado, Ill., via I. C. R. R. and C., C., C. & St. L. through combination, rate per ton	Lowest available rate from Dering No. 2, located on I. C. at Eldorado, to points shown in column 1
Middlesworth	$1 64	$2 78	$2 78
Windsor	1 64	2 72	2 72
Gays	1 64	2 67	2 67
Mattoon	1 65	¢ 1 65	1 65
Lexa	1 65	¢ 2 56	2 56
Charleston @	1 65	2 72	2 08
Embarrass	1 50	2 72	2 72
Ashmore	1 50	2 78	2 78
Kansas @	1 49	2 84	2 84

Above through combination rate made up of I. C. R. R. rate to Mattoon, plus C., C., C. & St. L. distance rate be- [fol. 453] yond except —¢— through competitive rate.

Column 1 To	From Eldorado, Ill., via C., C., C. & St. L. Ry., tariff I. C. 139-F, I. C. C. 7836, rate per ton	From Eldorado, Ill., via I. C. R. R. and C., C., C. & St. L. through combination, rate per ton	Lowest available rate from Dering No. 2, located on I. C. at Eldorado, to points shown in column 1
Dudley	$1 48	$2 89	$2 89
Conologue	1 47	2 89	2 89
Midland	1 40	2 89	2 89
Vermillion	1 47	2 99	2 99

Above through combination rate made up of I. C. R. R. rate to Pana, Ill., plus C. C. C. & St. L. distance rate beyond.

Tariff Reference

C., C., C. & St. L. Ry. Tariff L. C. 139-F—I. C. C. #7836.
I. C. R. R. Tariff #3100-A—I. C. C. #E-1550.
I. C. R. R. Tariff #2864-F—I. C. C. #E-1602.

[fol. 454] EXHIBIT No. XVI

Recapitulation of Statement Comparing Hours' Work with Potential Working Time by Mines Having Big Four or Big Four, I. C., and L. & N. Service With Mines Located Local to I. C. Only, Period From October 1, 1922, to March 3, 1923.

	Potential	Operated	Per cent
Sixteen mines on Big Four	16,192	10,129¼	62 5%
Four mines, Big Four, I. C., and L. & N	4,096	2,847¾	69 5
Mines on I. C.	2,048	847	41 3

[fol. 455] EXHIBIT No. XVII

Statement showing distribution of shipments and per cent of total shipments to five districts, comparing four competing companies in Saline County having Big 4 service with the J. K. Dering Coal Co. having I. C. Railroad service only. Year Ending March 31, 1922

Shipments to—	Four competing companies, tons	Per cent total tonnage	J. K. Dering Coal Co.	Per cent total tonnage
Illinois, except Chicago Switching District	963,278	25.3	43,569	14.3
Chicago and Switching District	765,534	20.1	174,263	57.5
Chicago—Indiana Switching District	61,966	1.6	1,289	.4
Indiana, except Chicago Switching District	622,445	16.4	286	.1
Michigan	121,438	3.2	.....	.....
	2,534,661		219,357	
Other Destinations	1,263,706	33.3	83,374	27.6
	3,798,367	100.0	302,731	100.0

[fol. 456] EXHIBIT No. XVIII

Statement Showing Actual Cost and Reconstructed Cost Assuming 74.4 Running Time, or Dering Mine No. 2

			Per ton	
	Actual	Reconstructed	Actual	Reconstructed
October, 1922.....	59,329.67	94,343.31	3.253	2.589

Statement Showing Actual Cost and Reconstructed Cost Assuming 69.9 Running Time

November, 1922.....	67,370.05	79,127.01	3.128	2.885

Statement Showing Actual Cost and Reconstructed Cost Assuming 69.7% Running Time

December, 1922.....	74,979.85	86,933.19	3.183	2.949

Statement Showing Actual and Reconstructed Cost Assuming 69.7 Running Time

January, 1923.....	56,537.52	83,942.28	3.298	2.744

[fol. 456½] Statement Showing Actual Cost and Reconstructed Cost Assuming 71.5 Running Time

February, 1923.....	58,180.85	85,409.71	3.106	2.669

[fol. 457] EXHIBIT No. XIX

Statement of Rates on Bituminous Coal Applicable from Eldorado to Representative Destinations in Illinois, Indiana, and Lower Peninsula by Way of Big Four

From	Rates in dollars & cents per ton of 2,000 lbs.	Routing	Tariff authority	
Eldorado, Ill., Big 4, to Indianapolis, Ind.	$1 64	Big 4	C., C., C. & St. L.—I. C. C. 7836	
Ft. Wayne, Ind.	2 14	Muncie, Ind. Ft. W. C. & L.	"	"
Lafayette, Ind.	1 96	Big 4	"	"
		Danville, Ill. N. Y. C.-Hardy, Ind. L. E. & W.	"	"
		Mansfield, Ill. Wabash Ry.	"	"
South Bend, Ind.	1 99	Danville, N. Y. C.-Hays, Ind. G. T.	"	"
		Danville, N. Y. C.	"	"
Muncie, Ind.	2 02	Big 4	"	"
		Indianapolis, Ind. L. E. & W.	"	"
Chicago, Ill.	*1 95	Danville, N. Y. C., Hartsdale, or	"	"
		Gary, Ind. M. C.	"	"
		Danville, N. Y. C.	"	"

*For local deliveries.

Exhibit No. XIX—Continued

Statement of Rates on Bituminous Coal Applicable from Eldorado to Representative Destinations in Illinois, Indiana, and Lower Peninsula by Way of Big Four—Continued

From	Rates in dollars & cents per ton of 2,000 lbs.	Routing	Tariff authority	
Chicago, Ill.	#1 83	Danville, N. Y. C.	"	"
Danville, Ill.	1 83	Big 4	"	"
Kankakee, Ill.	1 95	" 2	"	"
Paris, Ill.	1 33	" "	"	"
Jackson, Mich.	3 03	Ansonia, Ohio, C. N.	"	"
		Niles, Mich., M. C., or Danville	"	"
		N. Y. C., Hartsdale, M. C.	"	"
		Elkhart, Ind., N. Y. C., Toledo, Ohio	"	"
		N. Y. C. or Danville, N. Y. C.	"	"
Grand Rapids, Mich.	2 77	Elkhart, Ind., N. Y. C., or Danville, Ill., N. Y. C.	"	"
		Benton Harbor, Mich., P. M.	"	"
		Danville, Ill., N. Y. C., Chicago, P. M.	"	"
		" " " Gibson, Ind.,	"	"
		N. Y. C., Porter, Ind., P. M.	"	"

#Proportional for beyond local deliveries

[fol. 458] EXHIBIT No. XX

Illinois Central Ry.

Statement of Rates on Bituminous Coal Applicable from Eldorado, Ill., to Representative Destinations in Illinois, Indiana, and Lower Peninsular of Michigan via Illinois Central Railway.

From	Rates in dollars & cents per ton of 2,000 lbs.	Routing	Tariff authority
Eldorado, Ill., Ill. Cent. to Indianapolis, Ind.	$1 76	Ill. Central	Ill. Cent. I. C. C. E-1625
Ft. Wayne, Ind.	3 02	Chicago, N. Y. C. & St. L.	" " " E-1614
South Bend, Ind.	1 99	Kensington, C. L. S. & S. B.	" " " "
		Harvey, G. T.	" " " "
		Matteson, Ill. E. J. E., Crockett	" " " "
		Ind. Wab. Pine, Ind. N. J. T. & I. Ry.	" " " "
		Kankakee, N. Y. C.	" " " "
Chicago, Ill.	1 95	Ill. Cent.	" " " E-1625
Kankakee, Ill.	1 95	" "	" " " "
Jackson, Mich.	3 02	Kankakee, N. Y. C., Bryan, O., Big 4	" E-1614
		Matteson, Ill. M. C.	" "
		Kankakee, N. Y. C.	" "

EXHIBIT No. XX—Continued

Statement of Rates on Bituminous Coal Applicable from Eldorado, Ill., to Representative Destinations in Illinois, Indiana, and Lower Peninsulas of Michigan via Illinois Central Railway—Continued

From	Rates in dollars & cents per ton of 2,000 lbs.	Routing	Tariff authority
		Harvey, G. T., Vicksburg, Mich. G. R. I.	Ill. Cent. I. C. C. 1614
Grand Rapids, Mich	2 77	Matteson, M. C., G. R. & I.	" "
		Kankakee, N. Y. C.	" "
		Chicago, P. M.	" "
		Matteson, E. J. E., Porter, Ind. P. M.	" "
Muncie, Ind.	3 15	Indianapolis, Big 4 T. C. I. C. C. E-1625—Big 4 I. C. C. 7836	
Paris, Ill.	3 06	Mattoon, Ill. Big 4 " " " " "	
Danville, Ill.	3 03	Tuscola, Ill., C. & E. I. I. C. I. C. C. E-1625 Galligans T. C. C. 29	

[fol. 459] STATEMENT RE EXHIBIT NO. XXI

Copy of charter of J. K. Dering Coal Company.
(Introduced as a separate document at another point in the record under certificate of the Secretary of State.)

[fol. 459½] EXHIBIT NO. XXII

Copy of the petition of the Illinois Central Railroad Company, Southern Illinois Railway and Power Company, and J. K. Dering Coal Company for Permission to Cross Tracks at Grade Near Eldorado, Illinois, Illinois Commerce Commission Docket #12819

[fol. 460] To the Illinois Commerce Commission, Springfield, Illinois:

The above-named petitioners respectfully show:

1. That the Illinois Central Railroad Company and Southern Illinois Railway and Power Company are railroad corporations duly organized under the laws of the State of Illinois and operate lines of railroad in Saline County, Illinois, and are engaged in the transporttaion of freight from said county of Saline to points in Illinois.

2. That the petitioner J. K. Dering Coal Co. is an Illinois corporation engaged in the mining of coal and operates a coal mine near the City of Eldorado in Saline County, Illinois; that said mine is located about two and one-half miles west of the City of Eldorado; and that the hoisting shaft is located a short distance north of the railroad track of the petitioner Illinois Central Railroad Company.

3. That it is the desire of said J. K. Dering Coal Co. to make track connections with the Southern Illinois Railway and Power Company and the Cleveland, Cincinnati, Chicago and St. Louis Railway Company for the purpose of [fol. 461] having said last named companies serve said mine, and that in order to reach the tracks of said last named companies it is necessary to construct a mine spur track from said mine of said J. K. Dering Coal Co. to the tracks of the Southern Illinois Railway and Power

Company and the Cleveland, Cincinnati, Chicago and St. Louis Railway Company.

4. Your petitioners further represent that said proposed track will cross the tracks of the Illinois Central Railroad Company and the Southern Illinois Railway and Power Company, as well as three highways, all of which crossings, are to be substantially as set forth on plans attached hereto and made a part of this petition.

Your petitioners further represent that they have agreed among themselves as to the manner in which said crossings shall be constructed and the basis on which the expense of constructing said crossings shall be assumed, which agreements will be reduced to writing and filed with this Commission.

Your petitioners further represent that the entire cost of the construction of said track and crossings will be borne by your petitioner J. K. Dering Coal Co.

And your petitioners respectfully request this Honorable Commission to permit said mine track to be constructed, operated and maintained in the manner above set forth.

Wherefore your petitioners ask that the Commission proceed to review the places of the proposed crossings, if deemed necessary, and after such investigation and hearing as may be required to provide by an order the place where and the manner in which said crossings shall be made.

Dated at Chicago, Illinois, this 22nd day of ——, A. D. 1922.

J. K. Dering Coal Co., by C. B. Cardy, Its Attorney; [fol. 462] Illinois Central Railroad Company, by J. G. Drennan; Southern Illinois Railway & Power Company, by J. Paul Clayton, Vice-Pres., Petitioners.

[fol. 463] EXHIBIT No. XXIII

Offered by defendant. Copy of evidence and proceedings before Illinois Commerce Commission, material parts of which are abridged into the record as follows:

[fol. 464] Exhibit No. 23, introduced before the Interstate Commerce Commission, in Docket No. 15,552, consists

of testimony introduced before the Illinois Commerce Commission in a similar proceeding between the same parties, relating to intrastate commerce. The following is a narrative statement of the testimony so introduced before the Illinois Commerce Commission:

Mr. J. B. PAULEY was called as a witness. After having been duly sworn, he testified as follows:

My name is James B. Pauley and I am Vice President of the J. K. Dering Coal Company. I have been connected with that company about 6 years. The Dering Coal Company are producers and sellers of coal. We have mines located in both Indiana and Illinois. The only mine in Illinois the company owns at this time is located in Saline County, near Eldorado, Ill. I am familiar with the application made for the purpose of obtaining a connection with the Big Four Railway Company, to a switch line we propose to build from our mine to the Big Four. The purpose of building the track between the mine and the Big Four and obtaining connection with the Big Four is to give this mine adequate railroad service in comparison with its competitors in the same field. The coal lands assigned to the mine in question are adjacent to the main line of the Big Four Railway, what is known as the Cairo Division, I believe, and to a branch line of the Illinois Central, running from Duquoin to Eldorado. Something like 95% of the production of Saline County is shipped out by the Big Four road. Generally speaking, the coal lands in question are located as near to the main line of the Big Four as most of the other lines in Saline County—in some cases much nearer. Our competitors at the present time from the standpoint of railway service and from the standpoint of markets, have a distinct advantage over our mine [fol. 465] for which reason we are under an unjust handicap, and it is to obtain the same service as our competitors and the service upon which we calculated when we purchased the coal lands in Saline County and sank the mine in question. (Tes. 2-4.)

The only railway service we have now is the service of the Illinois Central branch line running from Eldorado to Duquoin. In the first place, we have some 3,670 acres of coal

land producing a quality of coal at least as good as any other produced in the state of Illinois. We have there an estimated tonnage of 29 million tons. That mine was sunk in 1917, equipped with the best modern machinery, designed for coal mining purposes at the time it was put in. There is an investment there in machinery, equipment, shafts and development alone of about $760,000. The property stands on our books at a very conservative estimate of worth at $1,600,000—somewhat over. We have put in every device we know for the practical preparation and marketing of coal. The petitioner's capacity—for which that mine is designed—the capacity of the hoisting engine or equipment, size of pit cars and shafts, would be capable of producing easily 3,500 tons and up to 4,000 tons per day. Assuming that adequate car service is obtained, it would normally reach the capacity I have mentioned in very much less time that has elapsed since the mine was completed. It has not yet reached normal capacity. I have prepared a number of exhibits. (Tes. 4-5.)

(Petitioner's exhibits 1, 2, 3, 4, 5, 6, 6a, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 were marked for the record.)

The Dering Coal Company expects to stand the entire cost of the construction of the track from its mine to the Big Four right of way, to purchase the right of way and construct the line entirely at its own cost.

Exhibit No. 1 shows by a red line a survey that was made for the purpose of this connection heretofore described. That survey was made by an engineering crew of the Illi- [fol. 466] nois Central Railroad under the supervision of the Engineering department of that railroad. I understand the general plan was approved by the Engineering Department of the Illinois Central. The mine is located at the end of the track designated Four Loading tracks—to the north of their main track. This proposed switch line then starts from the end of the main switch track at the point where they join the Illinois Central; then follows a line approximately due south for the most part adjacent to the half section line, across the Southern Illinois Railroad and thence joins the main line of the Big Four. It would not be practical to have this line come in otherwise than at the point where it comes for a number of operating reasons

that have to do with the operation of the mine property. (Tes. 5-7.)

I am generally familiar with the topography of the country. I have walked over it myself. There are a number of steep grades—the rest of the land is approximately level. There is no doubt it would be necessary to cut off some little knolls and throw the dirt into lower places, but so far as I know railroad lines it would be considered in all probabilities, a good lay out. There are farm lands adjacent to the track. Our instructions as to the construction of the track will be to build it and provide to all intents and purposes within all practical limits, whether it is practical to go on the switch site, the construction of that track will be left to experts that know how to put down that track. We will be guided by their suggestions. It is not our policy to lay a track that serves our mine that is not safe.

It is contemplated to build it of the same track material as generally obtains on the main line of the Big Four and the Illinois Central in that part of the country. The arrangements have been made for the acquisition of the right of way over which this track will be laid. The contemplated piece of track will cost about $70,000. Its distance is slightly over 2 miles—in the neighborhood of 2⅓ miles from the [fol. 467] mine to the Big Four. What I mean is that that is the distance from the point of connection with the Illinois Central to the point of connection with the Big Four. The mine is very near to the Illinois Central—no great distance. (Tes. 7-9.)

The located line described between the Illinois Central and the Big Four is shown in red on the map. None of it is constructed now. We have secured the right to cross the highway at grade. We have permission from the Commission to cross the track of the Joliet Electric Railway Power Company. That involves crossing the tracks of the Illinois Central—by a switch.

This blueprint was prepared by the Engineering Department of the Illinois Central. Our company will not operate the cars over this track. Equipment will move over this road up to the I. C. crossing and then up to the mine. The track will be from the mine to the connection with the Big Four. It is about 2½ miles from the place that this track will cross the Illinois Central to the point where

the Illinois Central is connected with the Big Four at Eldorado. There is a track connection at that point between the Illinois Central and the Big Four. We have a contract with the Illinois Central for that crossing. I haven't a copy of it. We haven't signed a contract—we have agreed on all principal items. We would permit the Illinois Central to operate over that track if they so desire. They do not retain full control of the track. That track is to be constructed by us at our charge for the purpose of having the Big Four serve our mine. That is the primary object of that track and we will forego no rights that would in any manner limit the purpose for which it is constructed. The Illinois Central will be given the right to operate over that track for the purpose of serving a mine which is near the junction of this switch line on the Big Four Railroad. (Tes. 9-12.)

Mr. Gillespie: We desire the record to show we object to all the evidence because we take the position the Commission has no jurisdiction. (Tes. 12-13.)

[fol. 468] Exhibit No. 2 is a profile map made for the purpose of indicating the grades and levels of this track, made by the same engineering crew of the I. C. at the same time they made the survey of the line. I am familiar with the operation of the railroads over mine spurs in Illinois—I have been seeing those things. Based upon my experience in the coal business and my general knowledge in handling coal traffic I would say that empty and loaded cars can be handled from the Dering Coal Company's mine over the proposed track to the tracks of the Big Four with a reasonable degree of safety. I see no reason why it would not be as good as the average switch track. As a matter of fact my instructions have been that people who have worked on it and intend and when we build the track it will be made as good as it can be made, both as to classification and grade and everything. This proposed switch track does not differ substantially from the ordinary mine track spur that exist upon the right of way of the main line to the mine. This profile map, Exhibit No. 2, was prepared by the Engineering Department of the Illinois Central. I was present on the ground on and off when the Engineering corps were on the ground. That was some time in November.

Exhibit No. 3 I had made to show the boundary line of our coal lands which are adjacent and which we expect to mine out from this mine. Coal lands owned by the Dering Coal Co. are shown in yellow on Exhibit 3. The nearest point between the Big Four Road and our holdings is at a distance or about ½ mile. There are something like 3,670 acres of coal land at this point; perhaps 40 acres have been mined out. It is from this point we desire to take coal out and ship it over the line of the Big Four via the proposed connection. On this map, each one of the blocks is ¼ mile. (Tes. 13-16.)

We have heretofore made application to the Big Four for transportation service to this mine. In the first place I had a conversation with Mr. Worcester, Vice President of [fol. 469] the Big Four, with reference to a connection which would give us Big Four service at this mine. This conversation took place before any definite steps were taken to build the mine. The coal property shown on Exhibit 3 was acquired by the Dering Coal Company about July, 1917. My first conversation with Mr. Worcester was along about the time we acquired the first tract of coal lands and before we made any definite steps to build the mine. I had one conversation with him in his office in Cincinnati, the first one; another conversation in my own office in Chicago when Mr. Worcester called upon me there. I might say that I had Mr. Worcester's verbal assurance without any qualifications whatever that this connection would be made and the basis of this connection was a reciprocal switching arrangement between the Illinois Central and the Big Four at Eldorado. The fact of it would be that this mine would have the service of the Big Four Railroad at Eldorado. After having reached a verbal agreement with Mr. Worcester, which I have stated must have been in June, 1917, some letters passed as a result of which there is a letter from Mr. Worcester, dated June 25th, indicated as Exhibit 4, in which he definitely outlines the arrangement into which I entered with him verbally. I only want to show in addition to this fact, shown in this exhibit, that Mr. Worcester agreed without qualification to make this connection as described. (Tes. 16-18.)

Exhibit No. 5 deals with the same general subject and it is from Mr. Worcester. About the time this coal land was

acquired and before the mine was sold, I had arrangements with Mr. Worcester that mine would be served by the Big Four in some manner. And the manner he thought best was as indicated in Exhibits 4 and 5. At the time this discussion occurred with Mr. Worcester, we owned another mine north of Eldorado on the line of the Big Four. This is the one called the Eldorado mine on Exhibit 5. An interchange arrangement—an arrangement whereby we would get the service—was never made with Illinois Central and the Big Four in line with my understanding and in line [fol. 470] with the suggestions made in Exhibits 4 and 5. The Big Four refused to consummate their agreement. The matter was taken up with them a great many times with reference to obtaining this service. (Tes. 18-20.)

After it had become apparent that for some reason the Big Four officials wouldn't come to an agreement on the reciprocal switching arrangement there were several conferences with the officials representing Mr. Worcester as to means by which this end could be accomplished, by which we could get the connection with the Big Four. I recall distinctly one conversation with Mr. Brister in my office in which it was suggested that a switch track be built between our mine and the Big Four, we to advance the money. Mr. Brister is in charge of traffic of the Big Four. He was an officer of the Big Four at the time of the conversation. The substance of this conversation was that we were to advance the money. The Big Four was to build this physical connection; we were to be reimbursed at a certain allowance, one or two dollars per car of traffic for the money we advanced for this purpose. (Tes. 22-23.)

Subsequent to the conversation I had with the Mr. Worcester at Chicago last, the Big Four engineering department submitted to the Dering Coal Company plans showing the proposed switch track extending from the Dering coal mine north to the Big Four Railroad. I have not that plan. Following this conversation to which I refer, a corps of engineers from the Big Four did make a survey between our mine and the Big Four and I saw a blueprint or tracing plan of that survey in Mr. Worcester's office in Cincinnati at a later date. I have not in my files and never had in my files the plan made by the Big Four people. Further, along the line of that same proposal, in the latter

part of July, 1919, Mr. Herman, in charge of the surveying corps —. This surveying corps made the survey at no great distance from our present survey we have submitted. Our engineer at the mine was with the Big Four corps at the time they made this survey and from our engineer I [fol. 471] received a sketch showing the approximate route of this proposed line as made at that time. (Tes. 24-25.)

The original letter and the route is shown as Exhibits 6 and 6-a. We will admit this conversation was during the period of Federal control. The track proposed in Exhibit 6-a was never constructed. This track was never constructed for the reason that before any steps could be taken, the Big Four officials receded from the position they had taken in the matter. Subsequently, after Federal control, we took the matter up with the Big Four with reference to obtaining the Big Four service and to construct a switch track. It was taken up in October, 1921, by me, with Mr. Worcester. I have had correspondence with Mr. Worcester with reference to the proposed connection. Exhibits 7 and 8 (letters) were received from Mr. Worcester—both of them. Both are addressed to me, dated October 22 and 28, 1921. A member of my office had communication from Mr. Stevens about November 1, 1921, shown by Exhibit 9.

Eldorado is east from the point of the crossing connection with the Big Four. I should say 5 miles. It is 2½ miles from the Illinois Central to Eldorado. I think Eldorado is slightly nearer to the proposed connection than Harrisburg, but it is not very far from being half way between the two towns. Harrisburg is west and Eldorado east. Since the correspondence, shown by Exhibits 7, 8 and 9, we have been considering and working upon a right of way for the proposed construction of such a switch track as we now propose. We intend to pay the total cost of the construction of the track as indicated by Mr. Worcester. After making arrangements and accessions for the right of way, the question of the right to cross the Illinois Central and the Traction Line was presented to the Illinois Commerce Commission for such authority. Copy of the order, in docket 12,819, is shown as Exhibit 10. (Tes. 26-30.)

[fol. 472] There is a double track of the Big Four between Harrisburg and Eldorado. The main line—that is to say, the track used for passenger service—is on the opposite side from our requested connection, and that would be east. West of the main line is the passing track. The proposed connection would cut into the passing track and not into the main track. So far as I know, from my observation, the passing track is used for the purpose of switching to the mines on the line of the Big Four. The assembling yard of the Big Four is at Harrisburg. The assembling yard is the place where these tracks—well where they have tracks and other facilities. They take in there, I believe, all empties sent into that particular district and from there they are distributed and delivered to the various mines where they are in turn loaded and are then assembled in the same yard and the coal trains are made up and pulled out. That assembling yard is located north of the main line. The passing track with which this proposed connection would be made, runs right into that assembling yard. (Tes. 31-32.)

The connection we propose is in all respects, so far as I can see, exactly the same connection as the Wassman [Wasson] mine, as to direction and all other points, and that is within a few hundred feet of our connection. That connection is shown on Exhibit 1; the lead to the Wasson mine [Wasson mine] is indicated here as a lead to the Wassman [Wasson] mine. It is east of our proposed connection. The proposed connection is with the current of traffic. Empty coal cars are pushed into the Wassman [Wasson] mine, coming from the assembling yard, the engine is behind and pushed the cars into the Wassman [Wasson] lead and onto their high line—the empty storage track. By the current of traffic I mean the cars are pushed in with a locomotive behind—I have seen them go into the Wassman [Wasson] mine pushing the cars into the mine without switching and the loaded cars are in turn taken out by the [fol. 473] same locomotive ahead and are pulled out. (Tes. 32-33.)

If the switch point faced the other way, in placing empties into this mine, under the manner in which this traffic would be handled, it would have to pass that switch and back in, if they were put in below the mine. The mine at the present

time is located on a branch line of the Illinois Central road, which is approximately 50 miles from the main line of the I. C. and from any such assembling yard as I described at Harrisburg. That is shown on my Exhibit 11. In Exhibit 11 it is shown in green, the main line of the nearest main line of the Illinois Central, and also in green it shows this branch line connection at the mine with the main line at Duquoin. In red is shown the main line of the Big Four—Cairo Division. (Tes. 33-34.)

The commercial necessity lies in the fact that this branch line is, by its location and its physical condition, unable to properly serve this mine. Our empty and loading tracks at the mine were constructed for a capacity of 80 cars. That is to say, we can store 80 cars above the tipple empty and 80 cars below the tipple loaded. In approximating that, we considered the daily capacity of that mine, when running full at its potential capacity, to be about 80 cars. We all know the difficulties attending the operation of a mine when it is necessary to have service several times a day. That is to say, put in empties and after we have used our supply put in another. All that means, by reason of the grades and curves of this branch line of the Illinois Central, they would have to pull their loads at least 3 times a day—more likely 4 times a day—to Duquoin, the nearest point on the main line where they have an assembling yard. They can pull with their best and largest locomotives on that branch, not to exceed 25 loads at one trip. Therefore, it is impossible for them to give us the service we require to continuously operate that mine. It is not a question of cars; it is a question of service. (Tes. 34-36.)

[fol. 474] If we were given cars, given 80 cars above the tipple to start on, which is a day's run, when we finished the day we would have, then, 80 cars below the tipple. It would take at least 3 trips for them to take the cars from the mine, 50 miles away so that we could operate the next day and drop the cars down on this branch line; these people are not equipped to do that. Further than that, one of the greatest handicaps which we suffered by our recent experience is the fact that being 50 miles away on this branch, we would not get empties in in the morning in time to start the mine. With the best of intentions on the part of the Illinois Central, they have found it impossible to do that. They

advise us that our allotment of cars will be delivered so that we will be able to operate on the following day and we blow the whistle for the men to go to work and the men come down and owing to difficulties in transportation over which they have only partial control, they are unable to get the cars to us in time for the men to go to work and they quit work for the day. After reporting for work for the day the men are obliged to go home and we are commencing to have trouble with our labor. When we built the mine in the beginning we figured on certain markets—I repeat the statement previously made—45% of the coal that goes out of Saline County, is shipped by competitors and goes out on this main line of the Big Four. Our purpose is in the first place to get the service, and in the second place it is to get an opening to the markets on the Big Four not reached by other connections. (Tes. 36-38.)

The assembling yard on the Illinois Central is located at Duquoin and it is similar to the Big Four's assembling yard at Harrisburg. The Big Four assembling yard is about 5 miles from the Dering Coal Company property. For the last 2 or 3 years, the approximate running time of Mine No. 2 has been very close to 50%. It hasn't exceeded 50% over any extended period. My recollection is it is between 50% and 55%—it hasn't exceeded 55%. The average daily pro- [fol. 474½] duction on account of the reasons stated has varied very considerably. At one time we were up to 2,200 tons and then in periods after that we have gone back to 15 or 16 or 17 hundred tons. The mine cannot be operated at its maximum capacity at the present time. We never have been able to get our actual production up to capacity for which the mine was constructed. The reason, largely, has been a question of railroad service. The actual production would conform to the actual production for which the mine was constructed; if all conditions were normal, there is no reason why the mine should not have gone to potential production in 3 years. That requires something like 80 cars every day. The Illinois Central is not able to give us service; we don't get the cars—we don't know why. The purpose of Exhibit 12 shows the main trunk lines which we have in southern Illinois. The various coal producing counties adjacent to Saline County where our mine is located and in competition with us. The location of the Dering

Coal Co. land is shown on this map as well as the city of Eldorado and the city of Harrisburg, and the assembling yard of the Big Four at Harrisburg. There are 23 mines in Saline County and all of them are served by the Big Four with 2 exceptions. One is the Dering Coal Co. mine now in question and the other mine is Mine Five of the Saline County Coal Co. located at Galacia—not far from 10 miles from Eldorado. All other mines with the exception of the mine at Galacia and the Dering Coal Co. located in Saline County are served on the main line of the Big Four. Two mines are served jointly by the I. C. and the Big Four in Saline County. They are located right in the town of Eldorado. There are two other mines served both by the L. & N. and the Big Four. There are no mines better than the Dering Coal Co. mine No. 2—perhaps one or two might be as good in point of equipment. I believe there is only one other mine in Saline County with as large a potential production; one I believe is approximately the same.

[fol. 475] If there was anything better to be had in the way of equipment for the production and handling of coal, we would put it in. It is modern in every respect. I have shown in Exhibit 12, the assembling yard of the Big Four at Harrisburg, the assembling yard of the Illinois Central at Duquoin and also the assembling yard at West Frankfort. (Tes. 38-43.)

As a general proposition, in order to obtain adequate railroad service for coal mines, assembling yards are generally located within a reasonable distance from the mines, and certainly much closer than 50 miles. I do not recall any mines located further away than 50 miles from assembling yard, but I have no doubt that it exists; my only thought was, the further you get from any assembling yard, the more production difficulties there will be to be contended with as I explained. Exhibit 13 is for the purpose of showing the lines of the Big Four in the state of Illinois, which it does in red. The purpose of the exhibit is to demonstrate the markets located on the Big Four to which we are denied access at the present time. I have prepared an exhibit showing the markets located along and upon the lines of the Big Four Railroad in Illinois, and to which the Dering Coal Co. desires to reach.

(With the understanding that the line from Danville to Shiff is not the Big Four, the exhibit is admitted.) (Tes. 43-45.)

Exhibit 14 shows a number of points located on the Big Four in Illinois; it shows the population and number of coal dealers and industrial consumers. In other words, it is designed to indicate the markets on the Big Four Railroad. That is, in the state of Illinois. These markets are not accessible.

Exhibit 15 compares the freight rates on bituminous coal from Eldorado to local points on the Big Four with the combination rates by the Illinois Central and the Big Four. We would have to go up against the group rate, which is the same rate the other mines in Saline County have. (Tes. 45-47.)

[fol. 476] Exhibit 16 shows a list of customers to whom we can't make shipments and to whom shipments have been made—this is a partial list of our customers. Those were not shipments from this mine. There have been a great many applications to sell coal to them; I don't know whether we have actually sold coal, except at competitive points. (Tes. 48-50.)

I cannot say with reference to the specific customer of Armour & Co., East St. Louis, if we have had a request for coal since we sold the No. 3 mine. East St. Louis is a competitive point on the Big Four and the Illinois Central; and there are one or two others. On that particular point, I admit having at the present time a group rate from our #2 mine to E. St. Louis. With that in mind, there is no reason why we couldn't ship coal from our No. 2 mine to Armour & Company at East St. Louis. We have had orders from Armour & Co., but I can't say if it was East St. Louis. Armour & Co. were taken in partnership in that mine after the mine was purchased. I can't say that that is the real reason they bought that coal and had it shipped to East St. Louis—I don't know their object. We have a customer located at Lawrenceville—a large customer. We have shipped coal from Indiana to those customers. Lawrenceville is a local point on the Big Four. We still operate a mine in Indiana; it is located on the C. & E. I. (Tes. 50-51.)

I was trying to think I have demonstrated the necessity

of additional railroad service. If I have not, I have failed in my mission. I might say that we have made certain investments in mine organization which I have already mentioned. That investigation contemplated production on what we have heretofore termed the potential production. I stated the average running time of this mine at about 50%. Inasmuch as there is a very considerable proportion of the expenses necessarily continuous in an operation, unless we can get a fairly continuous running time and a tonnage which fairly compares with the potential tonnage, the cost of production is so high that coal cannot be advanta- [fol. 477] geously marketed. (Tes. 54-55.)

In a general way, I am familiar with the running time of the nearest of our neighbors. In a general way, I should say they have had almost double the running time that we have. That keeps us continuously changing our labor supply. The increased running time of mines served by the Big Four as compared with the running time of our mine is due to the railroad service and the additional markets in times of bad conditions from the standpoint of the coal operators. Mine No. 2, under discussion, is now actually producing coal. The company is desirous, ready and willing to ship coal via the Big Four over the proposed connection. Assuming that the proposed connection is made, as an estimate, I would say 1,500 tons a day is contemplated to be shipped over the lines of the Big Four to points in Illinois and other points. That is, assuming the mine reaches its normal capacity. Taking it today, when it is producing 2,000 tons per day, about half of that tonnage would be shipped out via the Big Four. (Tes. 60-61.)

Of the total production—of course it would be a guess, but I should say a thousand tons per day would go to points in Illinois via the Big Four.

"Q. Can you state what would be the fair average freight rate from Southern Illinois—the group rate?

"A. Seventy cents to a dollar; I should think the average rate would be $1.25 to $1.50."

Figuring 200 days per year running time, at 1,500 tons per day, would be possibly 300,000 tons a year, and the average freight rate at $1.25 to $1.50, the approximate revenue resulting to the Big Four would be say, $400,000 to

$425,000. That is on 300,000 tons shipped over the Big Four. 3,000 tons per day working 200 days per year would not be the outside production of that mine; the outside production of that mine should be 2,000 tons per day for 200 days, or 400,000 tons.

[fol. 478] "Q. Can you give us some idea about the approximate tonnage moving to local points on the Big Four of that 300,000 tons which now doesn't move via the Big Four at all and from which they get no revenue?

"Mr. Connell: Is your question confined to Illinois?

"Mr. Cardy: Illinois, yes.

"A. I think we might hope to get a state traffic in Illinois to the extent of one thousand tons a day—two hundred days a year." (Tes. 61-63.)

The complainant is able, ready and willing to pay the prevailing freight charges that would be assessed on mined coal from this mine to points in Illinois shipped over the Big Four. I have prepared a statement showing the comparative running time of Mine #2 of the Dering Coal Co. with the other mines served by the Big Four in Saline County. That statement covers a short period, approximately for the month of October, 1922, supposed to be a representative period and about the last figures we had available for that purpose. That statement was prepared under my supervision and direction. The data was obtained from periodical statements that are put out by a coal trade bureau in Illinois. That is Honnold's Bureau. Practically all operating companies in southern Illinois belong to it and report to it periodically. This exhibit covers a period of 5 weeks. As a matter of fact this exhibit compares all of the principal mines located on the Big Four with the #2 Mine and the other mine located on the Illinois Central as to service only. The Dering Coal Company is included with one other mine, which is on the Illinois Central and this shows the Big Four mine's running time 61.8% and the Illinois Central mine—two of them—38.6%. I have heretofore stated that I had it in mind that the other mine operated practically twice as much as we did. This shows 39% against 70%—against 62%, not 70%. It is not the desire or intention of the petitioner to ask the

commissioners to prescribe any rules or regulations with reference to the distribution of cars in this proceeding. (Tes. 63-65.)

Cross-examination:

[fol. 479] From Eldorado to our mine, by way of the Illinois Central, it is about 2½ miles. From the connection between the Illinois Central and the Big Four at Eldorado, to this proposed connection with the Big Four, is approximately 5 miles. When we get this connection built, if it is built, it would connect the Big Four with the Illinois Central. So far as we are concerned, we will build a switch for the purpose of connecting our mine with the Big Four. The physical construction from this switch we are constructing will cross the main line of the Illinois Central. Our mine track with which we propose to connect this at our mine, is connected with the Illinois Central main track. There is no physical reason to keep us from delivering cars from our mine to the Big Four R. R. over the connection at Eldorado. There is no physical reason why that can't be done as the track now exists. And there is freight constantly being delivered over that connection at the junction of the Illinois Central and the Big Four. The Big Four Railroad runs from Cairo, through Harrisburg to Mt. Carmel, thence to Paris, Ill., and thence to Danville. The other connections on the Big Four in Illinois are connections east of the crossing of the Big Four at Danville with the Peoria Division and east of the crossing of the Big Four main line of the Big Four, St. Louis Division, at Peoria. Parker is the principal consuming point between Harrisburg and Cairo where a considerable amount of coal is consumed. That is a junction point only. I don't notice any of any particular note aside from Parker on the list. I see Parker is down on the list without any dealers or population noted. I know what Parker is—it is only a junction. They don't consume anything at Parker except sardines and crackers. Our list shows that is true with respect to every other station between Cairo and Harrisburg. I have no means of telling any places between Harrisburg and Danville where any considerable amount of coal is consumed, except this very incomplete map, but we have a schedule of stations,—Exhibit 14 here. (Tes. 66-69.)

[fol. 480] Lawrenceville is between those two points, and they consume there a considerable quality of coal for commercial purposes. I know we have supplied that point, and I can't answer without looking it up whether it is true that the coal consumed in Lawrenceville is taken from other fields and can be reached from other fields at less expense than we from the Harrisburg field, can. We have shipped a considerable amount over there; I notice by this statement here, 25,000 tons and that is considerable coal. I judge that is not much over a year's time. I don't know if any shipments of coal can be made from Big Four territory into Illinois Central territory on the present rate adjustment. Physically it can be done, but scientifically and under the present rate adjustment it cannot be done. I do not think it is correct to say that 95% of all the coal that is mined at Harrisburg is shipped into big consuming centers like Chicago, St. Louis and Indianapolis and that class of cities. I have no figures on that. I would say the percentage of coal produced there and shipped into large centers would be 75% or 80%. About 10% of the coal that is produced frim this mine is shipped to local points on the Illinois Central. Perhaps that is large. I couldn't say 5% would be nearer correct; I thought 10% and so stated. I presume that it is true that the local points on the Illinois Central are many, many times the local points on the Big Four, but the Illinois Central gets into other coal fields. This branch of the Big Four would not, in my opinion, get into other coal fields; it would draw its coal supply from Harrisburg—from the Harrisburg field.

"Q. And on the other hand the supply of coal on the Big Four main line would draw its supply of coal from the Harrisburg field and the East St. Louis field and the Staunton fields?

"A. You see, referring——

"Q. I mean Peoria and St. Louis—the St. Louis Division. That main line?

"A. Perhaps so."

[fol. 481] You have mentioned there fields producing a quality of coal radically different from the coal produced in Saline County and on this division. You mentioned the St. Louis division. I notice several customers on there—I notice Mattoon. I don't know if Mattoon is Illinois Cen-

tral territory. It is on the main line of the Illinois Central and it is on the Peoria Branch. In Peoria, Bloomington, Decatur, but not in Springfield, we have customers. I can't tell if the I. C. reaches every considerable town in the State. I am not sufficiently posted to tell you any town it does not reach of any coal consumption capacity. We complain of the Illinois Central service. That is the thing, absolutely, that we are complaining of at this time, under section 45. (Tes. 69-73.)

If the Illinois Central had a service that would serve us, we would have no complaint. No one else is a party to this contract we have with the Illinois Central besides the Illinois Central; just it and our company. There is no one else in on that deal in any way in connection with it. The Southern Illinois Railway and Power Company has nothing to do with that contract. We have to cross the lines of the Traction Line, and in consideration for that, we would let them operate from their track to our mine. That is the plan. If the law gives them permission to place electric poles and operate it and haul miners, if they want to be hauled, we would be agreeable. The contract we have discussed includes that. It is not the case that they are to pay part of this expense. This contract provides that the Illinois Central may, if they so desire, service [serve] the Wasson mine. it does not provide the use of that track by the Illinois Central. I don't recall that it provides anything else at all. I can't recall if it provides that no one shall have a connection with that track unless with the consent of the I. C.

The correspondence I spoke of with Mr. Worcester related to an arrangement that was made, or we sought to make, by which we—the mine we sold, located on the Big Four, and the mine which we are attempting to obtain serv-[fol. 482] ice for—should be both joint mines on both the Illinois Central and the Big Four. That is true. That is the matter that was up at that time. It is also true that we filed a complaint on that subject and threshed it out before the Interstate Commerce Commission, and I believe the Interstate Commerce Commission held we could not do that. (Tes. 73-76.)

At that time, this subject of a track connection such as we are making now, had never been discussed between Mr.

Worcester and myself until he refused to carry out the original agreement and after he refused that, then the question of a physical track came up. We had this in mind—that without the agreement with Mr. Worcester to make a reciprocal switching arrangement that mine never would have been sunk to the north of the Illinois Central—it would have been sunk on the south side of the tracks, very close to the Illinois Central—with an Illinois Central connection. I stated that my general recollection over a considerable period of time was that our mine operated about 50 to 55%—later this exhibit shows that in a certain 5-week period it was 36%. That is an aggregate period and conditions were extraordinary at that time. There were normal conditions which existed since last fall. It was during the period of the car shortage. This 36% was not during the strike—the strike was finished in August and this was in the month of October. I would say that more than any other cause was the railroad strike which existed at that time. Those were all extraordinary conditions. As to why we did not make up our list and select a particular period when these conditions did not exist to make this comparison—36% on Exhibit 17—: We have had time to make but a short statement; this statement was gotten out after we prepared the other one. We haven't had time to go into it and I simply told them to take a month—the last month we had a report for. I knew conditions were extraordinary when taking that month. Conditions were extraordinary as is shown by the 36% whereas I guessed 50%. As to where [fol. 483] I got the report of the Big Four loading: the mines down in that district report to the Honnold Bureau. All members get their statements out periodically. I cannot vouch for it; it is approximately correct and comparatively correct. It is true that would depend upon the accuracy or want of accuracy of Honnold's. (Tes. 76-79.)

When I stated this spur proposed to be built here was no different from any other spur track, I made my statement to mean the general lay of the land, grades, curves, etc. I didn't have in mind that physically and scientifically this track was like any other track there is in that territory—from the standpoint of the two lines. The conversation with Mr. Brister was a suggestion from him that there was a way of overcoming the difficulty—to build a track instead of making a reciprocal switching arrangement which was

objectionable to your people. I suppose that suggestion came at a time when he was representing the Federal Administration. Maybe it was 1919—I can't remember. It was in 1919 when this conversation with Mr. Brister occurred. That was at a time when the survey was made that is here illustrated in my Exhibit 6a. About all there was between me and Mr. Brister at that time is that he suggested that method of overcoming this difficulty. Whilst the matter was under discussion, Mr. Brister's people receded from their position and refused to go ahead, therefore it was never carried to a conclusion. We never reached an agreement—it never came to a final conclusion. Mr. Brister had simply made a suggestion he hadn't taken up with somebody in authority and it didn't reach any definite conclusion at all along the line suggested by him. Tes. 80-82.)

In relation to this survey, all I know is that it was made. When I stated we had the right of way for this track this morning, I meant we had it under option—written options—from the various parties who own the surface. I have not the option from Wasson of the Wasson Coal Co. Our track does not necessarily pass over part of their prop- [fol. 484] erty. The approximate line passes over the corner and we have a proposition from Wasson which we have not as yet accepted to go over there. All conversations passing between representatives of our company and Mr. Wasson, so far as I know, were with our attorney, Mr. Cardy. I have no personal knowledge of the right of way over the property of the Wasson Coal Co.; it is not true that I have no personal knowledge of the right of way over none of these lands. We have options over every part of the territory from our mine to the Illinois Central with the exception of the option over a small tract of land belonging to Mr. Wasson. The options are executed and recorded. We haven't the actual options west of and adjacent to the Big Four Railroad, but we have a telegram today that arrangements have been made which we have been negotiating. As a matter of fact, we haven't the options. When I referred to the mines on the Big Four as our competitors, I meant they sell exactly the same quality of coal that we sell to the same market. We do not reach practically the same market over the I. C. as they do over the Big Four—that is what we hope for. We consider our-

selves under sect. 45 of the Commerce Commission act entitled to the same markets that the other operators in the Saline County field have and we are barred from that by reason of railroad connections. There are 4 mines in Saline County—3 besides our own—situated in the same way we are—that is, serve local points on the Illinois Central. They are then really the only competitors in the local market from Saline County territory on the Illinois Central territory. (Tes. 82-86.)

I stated the capacity of our mine was about 3,500 tons a day. That is the bituminous normal capacity of the mine. That is a production we have never reached. It would take 90 days, or four months, to reach that—we couldn't do that tomorrow if we had all the miners and coal cars in the world at our command. At the present time, I should say the maximum production of our mine with the very best conditions that could be produced is about 2,500 tons. It would [fol. 485] take 80 50-ton cars to move 4,000 tons, and 50 cars to move 2,500 tons. It is true we have never worked 80 cars. We never had railroad facilities to get into that condition; if we had them, we would have been to 4,000 tons. We haven't had the service to enable us to get our working force together and when our working force would get together and conditions would improve and the miners would commence to come to us, we would be cut off through the Illinois Central being unable to handle this business and of course their failure to handle the business would result in our losing our men. It is facilities. There never has been a time when we could, or rather, when we had all the cars we could use with the present facilities. I do not recall that we ever have produced 50 cars, coming in a day, in that time. I think perhaps our highest number per day would be 22 or 24 hundred tons, which would be about 46 cars. We have produced that. We never had that number of cars, except for one day. There would be a question about handling that many cars to and from the mine. The difficulty is that 50 cars loaded, would constitute two train loads. On this branch line of the Illinois Central, they are not equipped and never have been, to handle that many loads out a day. On the other hand, we have empty cars time and again that were started to us and they told us they were going to bring them over and we would blow the whistle and the men would come to work and not be able to do so because the

cars were 50 miles away—hung up somewhere in that 50 miles. That involves operating conditions—those operating conditions between our mine and the yards at Duquoin. In putting in the cars, part of it involved the placing of the cars into our mine. That is not all there is to it. There are the operating conditions over this 50 miles. Those two things are the only things involved.

The advantage our competitors located on the Big Four [fol. 486] have over us is that they are located on the main line of a railroad, designed as I understand, very largely, for the hauling of coal. They have their distributing yards and switch engine facilities, road engines, for that purpose. That is their business and a passing track for the purpose of serving the mine. They have a direct haul from the mines to the markets. (Tes. 86-90.)

The car supply matter enters into that, but we are not discussing that at this time. We are satisfied with the car distribution, it is the service we are discussing. We would like to have more cars. By this proposed connection, we expect to get better service, which will be productive of more cars. I can distinguish between cars and service. The Illinois Central has an ample supply of cars, but cars allotted to us, consigned to us, and ready to give us, but, with the best of good intentions they are unable to get them to us; they are 50 miles away. For one reason or another, they can't get on the branch or after they get on they don't get to the mine in time and the men go home, and frequently half an hour after the men have gone home, the cars arrive. Many times we have been given a few and get started, maybe with 10 cars, and the balance of the cars for the day's run are not delivered; they are unable to carry out their intentions and promises to us, which we in turn have made to our men. That is all service. We are complaining of the alleged inadequate service. Our complaint is, we don't get the service. To be sure, we don't get the cars. I judge that the car supply is adequate provided the Illinois Central could get them over a reasonable time and take them away within a reasonable time. I think the Illinois Central have as many cars per mile of road and per capacity on their line as the Big Four. I think so; I may be wrong. (Tes. 90-92.)

[fol. 487] I can't tell if they are giving to the mine at the same percentage of cars as the Big Four. As far as I

know, the service is about equal. Absolutely, we expect an increased car supply; if we get the service to haul the cars to us, we will get the cars. We never have told the Illinois Commerce Commission the service furnished by the Illinois Central is not what it ought to be. I am an officer of the Dering Coal Company, and Mr. Cardy, our attorney, is employed by our company. He has been, I presume, since about 1918. Before that, Mr. Cardy was formerly the attorney for the C. & E. I. We think he is fine. He is seeing that his company gets first class service all the time. I cannot tell you why he did not take up the question of inadequate service with the Illinois Commerce Commission. He has taken it up with the Illinois Central, but to my knowledge he has never taken it up with the Commission. I referred a few moments ago to Honnald's reports. They show loads for running time and they show the number of cars ordered and the percentage of cars furnished. The only two mines on the Illinois Central down there are not getting the same service. There are only two mines in Saline County included in this report. I do not recall having said the mines on the I. C. get the same service as on the Big Four—I think I referred to the running time and as shown by Exhibit No. 17 they are getting 38.6% as against 61.8%. The difference is manifestly due to the number of cars furnished, but our allegations here show, that by the service they have on this branch line, they couldn't serve us even if they had all the cars in the world; they would fall down. I don't claim they have not cars enough. I don't know if they have. The Illinois Central could haul cars over to Eldorado, but they couldn't get empty cars off the Big Four unless we made a reciprocal arrangement the way we spoke of. (Tes. 93-96.)

I do not know how the Illinois Central could continue to furnish us with these empty cars the same as they do the [fol. 488] other mines on its lines and instead of hauling them 50 miles over to Duquoin, bring them over to Eldorado, 5 miles away from our mine and turn them over there to the Big Four. That would be subject of course to the difference in freight rates. Rates are what I am complaining about. It would be possible for us to reach the markets on the Big Four if the rate adjustment was so that we would have the same rate from our mine to these markets we spoke of. They have other mines in Saline County to the

same markets and there would be a difference in the rates. That would not satisfy our complaint. That would not satisfy our complaint with reference to the fact that we were shut off from markets which I said might give us upwards of a thousand tons a day more; while that would obviate that complaint, it would not obviate our complaint about serving us cars. I now have outlined our outlet on the group rate basis to all markets on the Illinois Central and to some other markets on connections with the Illinois Central. What we are now asking is some additional markets served exclusively by the Big Four. Whether, as to the markets served exclusively by the Big Four, that situation could be taken care of by a system of freight rates from our mine to the Big Four stations: That involves questions I am not competent to answer. I never have tried it. I don't know whether the Illinois Central could take loaded cars out of our mine over their road back to Eldorado and turn them over to the Big Four or not. They do have a physical connection. Whether the facilities are there for handling the cars, I don't know. In the case filed in 1917, '18, or '19, we asked the Interstate Commerce Commission and the Illinois Commerce Commission in two separate proceedings to compel the Illinois Central and the Big Four to enter into an arrangement whereby coal could go from our mine on the Illinois Central to Eldorado where it would be delivered to the Big Four and taken to its destination by the big Four. That is exactly what we asked the Commission to require them to do. There has been no physical [fol. 489] change in that that I know of. I can't say if that arrangement would be possible today or not. As far as I know, there has been no change. A system of rates established whereby we could reach the Big Four markets on some reasonable basis that would take care of shipments to local Big Four points, would satisfy our complaint. There would be no necessity for reaching those markets, but that is only a part of the case. (Tes. 96-99.)

Insofar as the service complained of is concerned, our complaint would be taken care of on the one hand. The other hand is getting the empties to us. Serving us with empties. What you speak of has to do only with cars after they are loaded. If the Illinois Central could furnish us with an adequate service, that is all there would be to talk about. I don't know if it is possible for the Illinois

Central to speed up their service on that branch or not. I stated the Illinois Central could haul only 25 loaded cars over this line. There never have been any cars handled over this proposed track yet. I have never been in the operating end of the railroad business myself.

I don't know whether or not there are any 2½ inch grades on the tracks of the Big Four serving these other mines in Saline County. (Tes. 99-101.)

I have no information regarding that. I got the idea that the service would be practically similar as a coal man from just looking at it. I looked at it on the ground; I can't tell you much about it on paper, but I can walk over the ground and tell you. I know an engine cannot pull as many cars up an inch and a half grade as a one per cent.

It may be that the connection with the Big Four will have to be made at some point slightly removed from that shown on Exhibit 1—2 or 3 or 4 hundred feet. Assuming we don't eventually get the consent of the Wasson Mines to cross its land, the connection would have to be made further down the Big Four track. It would have to be further south. I guessed 3 or 4 or 5 hundred feet.

[fol. 490] I can describe the Wasson property on this Exhibit 1. You will see it comes from the Big Four track just north of the red line; you will see there a white line labelled lead to Wasson mine. Now the Wasson mine itself is on up that lead, on perhaps an eighth of a mile. Between the Big Four and the Electric Line. I can't tell you exactly how far in the other direction the Wasson property extends; I guess about 2 or 3 hundred feet. The Wasson property is located here (indicating) so that this line goes across the corner of their property. The white line is the survey first made which follows the half section line straight down—first made by our company. I don't know if that also crosses the Wasson property. I would know where the Wasson property stops and the Davis property starts. That horizontal line intersecting the red and white lines may be the line between the Davis and Wasson properties. If so, this line also goes across the Wasson property. I think the line P. 2.24 plus 32.8 might be the line between the Wasson and Davis property. At any rate the proposed connection will have to cross the property of Mr. Brambly. We have an option to cross that, and also an option on part of the Davis land and his consent on the

balance. The original survey was then on the property of Mr. Thomas between his house and barn; then again on the property of Mr. Bramblet, it was run fairly close to his house. By coming off here about 250 feet we missed both of those houses. The original line was located on the half section line. That was the only reason for changing. In saying this morning the track would cross the main line of the I. C. by a switch, technically, perhaps I was wrong in saying switch. They wouldn't have to run on the I. C. at all. There would be a frong [frog] put in and they would simply have to cross the I. C. (Tes. 101-104.)

I would have to have described to me exactly the difference between a switch and a frog. If, where a frog is used, it is impossible to get from one track to another, that is the case here. Just beyond this crossing, after they got onto our switch, it would be possible for the I. C. to get [fol. 491] in on the Big Four tracks. These switch tracks beyond the right of way of the I. C. bring empties into our mine. In my Exhibit #3, all the property in the yellow enclosure belongs to the Dering Coal Co. I am positive of that. It is not proposed by the Coal Co. in case the switch connection is made to require the Big Four to operate into all the territory enclosed in yellow—to operate only to the mine. Our present mine. We have no ideas beyond the present mine at the present time. We would take coal out of the upper end of our present property through our present line.

On Exhibit 11, I show in green the line of the I. C., the Cairo Division and the branch over to Eldorado and in red the line of the Big Four. Those heavy black lines—where they have been exaggerated on the map—represent the C. & E. I. I don't think it necessarily shows that at the present time we can reach all the markets shown by the exaggerated black lines at the group rate basis. I don't know what point we can't reach. Exhibit 11 shows, I think, with respect to what you are talking about, exactly the same thing as Exhibit 12, as I understand. Exhibit 12 shows the main branch of the I. C., Big Four and C. & E. I., the three trunk lines serving the southern Illinois field. At the present time we do not have the group rate over the C. & E. I. Exhibit 15 shows a comparison of the rates from that standpoint, being the I. C. rate in combination with rates on the I. C.

and Big Four; that is only a comparison. I didn't prepare it; I know what I asked for and I know what it shows. I know how the figures in the last column were arrived at—by taking the Big Four rate plus the distance rate from our mine to Eldorado. Exhibit 15, page 1, says the rate to Parker is $1.17 and the combination rate is $1.45, a difference of 28¢. Apparently that is not the Eldorado combination of 72¢ plus the Big Four rate from Eldorado. (Tes. 104-108.)

I take it from our mine to Eldorado would be a switching [fol. 492] rate, whereas, from the mine to other points on the Big Four would be the distance rate; I wouldn't argue that, but I think so. I think the I. C. would charge more for hauling cars of coal from our mine to industries there in Eldorado than the charge for similar cars going out over the Big 4. I think that is the reason for this difference. We had an important customer at Lawrenceville and it is not possible to reach him because this combination of 2 rates is so much above the Big Four from the Harrisburg field to Lawrenceville, that we cannot serve him. As to how we were able to ship 2,000 tons to the Armour Elevator in Lawrenceville and approximately 2,500 tons to the Indiana Machine Co. there, if we had to pay the combination rate: We wouldn't be able to ship at the combination rate; we shipped them from another mine. These shipments shown in Exhibit 16 are from mines on the Big Four. I don't know where the Indiana Machine Co. gets their coal now. I am not sufficiently familiar with route shipments to be able to tell you if we could reach Charleston from our present mine on the group rate basis. We could reach East St. Louis. I don't know that Champaign is on the I. C. I mentioned Lawrenceville because I know. And Paris. I am not sure we can't reach Paris now on the group rate basis. The Pennsylvania, I believe, runs through Paris, but what the group rate may be I couldn't tell you. (Tes. 108-111.)

I said this morning that this survey for this proposed track had been approved by the I. C. R. R. This layout was made by their Engineering Department and the Chief Engineer, after it was made by his staff, approved it. We didn't have to get their approval; the approval was only for the purpose of saying whether it was a feasible, operating proposition. If the proposed track is built and the

connection is made, we will expect the Big Four to bring empty cars from its main tracks over to our mine and come over after the loaded cars. The Traction Line might handle coal for their own consumption over that line. So [fol. 493] far as I know, they don't propose to handle any other coal. I have no idea how much coal they consume. They operate with a trolley. That line runs from Eldorado to Carrier Mills and parallels the tracks of the Big 4 practically all the way. I have never been in the railroad service, and my opinion that this track could be operated with a reasonable degree of safety was given just because there are no bad curves and no bad grades. In a general way it would look to be like any other ordinary track. I am not passing as an expert. From the standpoint of a railroad operating man, I couldn't tell you how bad a grade a 1½% grade would be.

I stated I thought we might be able to get to a 1,000-ton basis to give to the Big Four if this track was constructed to go to Illinois points. I had in mind at all times that I could see no reason why it should not be divided half and half. When I said about 1,500 tons I meant 3,000 tons. When I said 1,000 tons, it was an approximation of what we might reach—that we would give the Big Four in the state of Illinois. Those markets did not include Chicago, but did Peoria. I think we reach Peoria over the I. C. I am unable to answer if we have a group rate over the I. C. without adequate facilities.

"Mr. Cardy: We can't get even to Peoria with all the coal they want. So a change in the freight rates won't help us any—won't help the transportation facilities. You can change all the tariffs in the world and they won't help us at all.

"Q. You agree to that?
A. Yes, sir."

We will have to have facilities to take loaded cars out promptly. I have had a letter within the past 2 or 3 days saying our loads had not been pulled from that mine for a matter of 3 days. To be sure, we are not getting but half time. It does not interfere with the actual running time. I couldn't say if it would work if we could get the running

time. The I. C. would leave loaded cars on the track—there have been times when cars were left on the track so [fol. 494] that they would interfere with the operation. They were unable to pull them. The difficulty has been they were unable to pull but 25 cars at one load and would necessarily have to make several trips a day. I don't know if they have more than one engine on that line handling coal between the mine and Duquoin. Assuming for the moment that this Commission won't require this connection we suggest, I see no other way of improving the service so that we could supply all our customers we would like to have. (Tes. 111-115.)

Under present conditions, it could not be done by an improvement in the present service. I do not think it would be practical to improve this I. C. branch to a point where it would be able to handle 80 cars a day. Nothing is impossible, but I think it is impractical. I know it is impractical and they won't do it. They would if the business was there, but the business is not there, from our mine. I say we can furnish 80 cars per day. That business is there. I don't know why the I. C. doesn't equip itself to handle those 80 cars a day. We have attempted to find out by harrassing the life out of the men on the 'phone and have sent a delegation up there in an effort to get better service. They told us they were doing the best they could and when we brought it to their attention—for instance, they would promise us to have cars at the mine on time and we would blow the whistle for the men to come to work and they would all come down prepared to work and there would be no cars. Well, we would call up to find out where the cars were and would be informed that they were unable to get the cars out of Duquoin, at times; or something happened to the engine or this or that and the cars wouldn't get there. That was during recent days—that is a common occurrence. I have only given engine failure—it might be any one of a dozen things. I can't tell where our empties come from. Chicago—the northwest, perhaps. I figure Chicago is one of the largest markets. (Tes. 116-118.)

[fol. 495] There is no reason why the I. C. couldn't handle cars back from Chicago to our mine if we had a main line track. I am not enough of a railroad man to say how their track from Chicago down to Duquoin compares with

the lines of the Big Four. I don't know whether the difficulties all arise on that short stretch of 50 miles or not; so far as we are concerned they mostly do. That is all I know about what occurs on that 50 miles. In this case we brought before the Interstate Commerce Commission and the Illinois Commission, wanting a reciprocal arrangement between the I. C., and the Big Four, the I. C., as well as the Big Four, did not oppose that arrangement. The I. C. never opposed that proposed reciprocal arrangement in any way. They will let the Big Four enter over their line. The I. C. would be agreeable to the Big Four getting into the No. 2 mine, provided they will be permitted to get into the Wasson mine. I don't know, under present conditions, how it would be possible for the Wasson mine to get any better service from the I. C. than our mine is getting under present conditions. There is no reason why the proposed track should not connect with the interurban line. That is the purpose—there will be a connection. I don't know whether that connection will be used to handle cars between the electric line and the I. C. I have it in mind they may want to take coal from our mine to their power house; as to handling any other traffic, I don't know if they have any other plans in mind, as they have already a connection. This crossing-proposed connection with the electric line is a grade crossing. I can't tell you what sort of protection has been installed there; the Commission will fix that. It is only on condition that the Illinois Central can have access to the Wasson mine that it is making this arrangement with our mine. They have stated that, and they have made the statement further than that. I have had no statement with the I. C. on the subject that they would not extend that track north from our place to the Wasson prop-
[fol. 496] erty that is not developed north of us. Mr. Markham said to me, that just because they were not able to render adequate service to this mine, he did not propose to take a dog in the manger attitude, as I recall his words, and say that no one else should serve us. (Tes. 118-121.)

I don't know that I could say that regardless of what the I. C. does or does not towards serving the Wasson mine, we have the right from them to cross this track and so understand it. Mr. Markham made it plain to me that he would only concede our making this connection in order to serve the Wasson mine. (Tes. 121-122.)

Redirect examination:

I said in testifying this morning that from memory, from judgment, I would say that our running time was approximately 50 to 55% and I still say so and at the same time I said that in my judgment, other operators had approximately twice as much running time as our mine. That gives them pretty well up to 100%—that covers a period of several years. I testified to that today and I do not change as a result of this statement, but I will tell you now, this statement shows the conditions for a period of one month since September, 1922. The changed conditions were extraordinary and unusual. A change in the freight rates will not in any manner improve the transportation service which is now being accorded this mine; I don't see that freight rates have anything to do with operating conditions. It is because of the operating conditions and railroad service. Referring to Exhibit 16; Carmi has the L. & N., but Robinson is a local point on the Big Four. In connection with this exhibit, I will file as a supplement to Exhibit 16 a statement showing the local points on the Big Four to which group rates apply. (Tes. 122-125.)

[fol. 497] We desire to ask in this petition only such grants and rights as we may have under section 45 of the law. That is a physical connection with the Big Four and the proposed switch track. There isn't any application at this time to require the Big Four to operate over this proposed switch track with its engines. I don't understand that we can. (Tes. 131-132.)

Cross-examination:

All we are considering at this time is to have the Big Four connect our track with its track under section 45. I have no definite ideas as to having them operate this track at this time. This track is to be our track. That track is built originally for one purpose; that is, to give our mine a connection with the Big Four. That is the purpose of the track and that is why we intend to make an expenditure estimated at—oh, $70,000—and it is for that purpose the track is being built. I don't understand when the track is built, it becomes public property. We desire to own, control and operate the track for the purpose stated and we do not forego any rights that are not forced upon us.

Personally I don't know that it is a public track. Assuming it is a public track, our attitude is that we want all the rights the law will give us that would be to our advantage and we would insist upon all such rights as may arise in the future that are to our advantage. (Tes. 132-135.)

A. A. Logue, called as a witness by petitioners, being first duly sworn, testified as follows:

My full name is A. A. Logue. I am assistant engineer on the Illinois Central Railroad. I have been with that company 16 years. I am located at Carbondale, Ill., and my general duties are in charge of maintenance of way and construction of tracks on the St. Louis division. My experience in laying out industry tracks, and main line construction, has continued since 1906, but I have handled coal mine tracks since 1917. Since 1917, I have had occa- [fol. 498] sion to lay out and supervise and construct mine tracks, serving mines located on the Illinois Central. I would say 20 or 25. I couldn't say about how many mines the I. C. serves in the state of Illinois, but on the St. Louis Division, about 100. I would say I was generally familiar with the manner of construction and method of operation of mine spurs in the state of Illinois, generally. I had something to do with the laying out of the mine track shown in red upon Exhibit 1. I made a preliminary investigation on the ground and submitted preliminary maps to our Chief Engineer and upon my recommendation, the survey was made along the line indicated in red. From my examination of the ground and of the blue prints and profile, I have an opinion as to whether or not the proposed track can be operated with a reasonable degree of safety. For the purpose of transporting coal traffic from the mine of the Dering Coal Co. to the connection of the Big Four, I would say it could be operated with safety. (Tes. 135-137.)

I have had no direction experience; no control over any operating movements only by casual observation. From those casual observations I have an opinion on the question—I would say not a conclusive opinion. I said I never had any operating experience. I know nothing about operating on the Big Four. I haven't handled their tracks

or yards. Only in a general way could I possibly have an opinion as to whether or not this track will interfere with operation or whether it is safe or unsafe. (Tes. 138-139.)

My opinion in a general way would only be a guess—without actual knowledge. I do not see any reason why this connection would materially increase any operations. As I understand it, this proposed switch connection connects with the passing track or secondary track of the Big Four. The connection would conform with all the standards and requirements of the Big Four—it would have to [fol. 499] do that. The weight of the rails, the type of construction, and everything. So far as the Illinois Central is concerned, the proposed switch is similar to the construction of other switches. It is a fact that this connection will be similar to a hundred other switch connections operated in the Southern Illinois Coal field. I don't see that the fact that it is connected with the passing track and not the main track would affect it in any way. (Tes. 139-141.)

Cross-examination:

I don't have charge of all of the construction on your Illinois Central St. Louis division. My duties are maintenance of way and the construction of ordinary projections. Big constructions would be handled especially by the Chief Engineer's office. I was instructed by the Division Superintendent, Mr. W. Atwell, located at Carbondale, to make this survey. I am a subordinate in that office. I don't know where Mr. Atwell got his instructions; I know nothing about that. I suppose it was in a way done by the Illinois Central; I didn't question that. I was instructed by my superior officer to take care of it. I don't know as I understood I was doing it as an Illinois Central project. I couldn't say whose project it is if it is not an I. C. project. I did this work under the direction of the Illinois Central Railroad. I did it in the regular performance of my duties. Of course if this work had been done by private employment, by Mr. Pauley's company, and in accordance with our suggestions, then it possibly would have been confined to a simple matter of crossing our tracks. There is no reason that I know of why that couldn't be done with this private road. I have not seen the contract in force, and I have not seen the memoranda. I did not have a conference with any-

body in connection with it. This contract will not connect with the main line of the Illinois Central. The track we have to the Dering Coal Mine No. 2 is going to connect. That track is on our map. (Tes. 141-143.)

[fol. 500] "Mr. Ewald: Is that the proposed connection or is it the track that is already connected?

"A. It is the proposed connection—or the proposed track."

That track is indicated in red; it is the only track proposed.

"Q. Where is it going to connect with the Dering Coal Company Track?

A. These tracks that we have to the Dering Coal Company mine."

That switch is right into our main line. We will not have a frog also at the point there that leads into the main track. That couldn't be done very well; unless you crossed at an angle and put in a slip switch and that is too great an angle. The Illinois Central could also build a Y connection with the main track. As it comes into these tracks and movements on these tracks could be made back in the opposite direction right on to the main track of the Illinois Central—directly connect with the Illinois Central. This proposed track will not connect with the main track of the Illinois Central, but will be hooked up with the main track or mine track of the Dering Coal Co. that leads to the main line. It leads direct from the mine track to the main track of the Illinois Central. (Tes. 143-145.)

(Copy of contract entered into by the Dering Coal Co. with Illinois Central Railroad Company for construction of switch received in evidence as Exhibit No. 18.) (Tes. 163.)

(Copy of contract with the Southern Illinois Railway & Power Co. with reference to the crossing and the possible use of the track in question, received in evidence as Exhibt 19.) (Tes. 164.)

W. T. STEVENSON was called by petitioner and, being first duly sworn, testified as follows:

Direct examination:

W. T. Stevenson is my name. I am traffic manager of the Big Four. I have been connected with that company for about 28 years. The past 3 years I have been traffic man-[fol. 501] ager in charge of the traffic of the road. I cannot describe the duties of a traffic manager any better than to say that he has charge of the traffic of the road, dealing generally with the rates and schedules as to traffic originating on the Big Four and moving to the Big Four, and moving via the Big Four. The letter you hand me, dated November 1, 1921, is a letter from me to you. That letter was with reference to a conference which I had with you about in the middle of September, 1921, which was shortly after the decision of the Interstate Commerce Commission in a complaint filed by the Dering people involving the matter of the Big Four serving the mine on the Illinois Central. That conference was held, as I recall it, just a few weeks after the decision was received. At that conference, as I recall it, you stated that you desired the Big Four to serve the mine and advanced reasons which you felt were good reasons as to why we should serve the mine. I stated my personal opinion to you but I told you that I was not in position to say anything about it officially because I knew that Mr. Pauley had had a recent conference with Mr. Worcester, and was also in correspondence with him. You then asked me to take the matter up, and as soon as possible advise you the limit to which the Big Four would go in serving your mine. I took the matter up and that letter represents at the time it was written the limit to which we would go in serving the mine, the limit being the making of a track connection and did not contemplate service, cars or anything else except what is stated in the letter. At the time the letter was written the limit to which we were willing to go in serving your mine was to make track connection. That was in response to your exact words in your conference with me that I advise you the limit we would go in serving the mine. I have changed my views on that proposition since I wrote the letter of November 1, 1921. (Tes. 172-176.)

The reason for our change of mind was because nothing

was done by you people with regard to that letter until [fol. 502] some year- after it was written. At that time it was developed that you were not taking this letter as being an answer to what you had asked me, that you were interpretating it as a track connection, meaning that the Big Four was simply supplying cars and supplying service at the mine. That in and of itself would have made the agreeing to a track connection objectionable. In the next place it developed that this track be opened to use by the Illinois Central, which was never contemplated when I wrote that letter, and it has since developed that the track is going to be used by the traction line, which of course was not known when I wrote that letter. In addition to that the Construction of the track results in the Illinois Central getting very close to Wasson Mine No. 1, which was not contemplated when I wrote that letter. The objection to getting close to Wasson Mine No. 1 is that we don't care to divide the coal traffic in the Harrisburg district, which we spent a good many million dollars to develop, with some other railroad. The Big Four have no interest, that I know of, in the coal mines in Saline County. The Wasson mine is located just south of Eldorado on the Big Four. The Illinois Central, as I understand it, has a right to use that track for any purpose they please. We have 2 fundamental objections to the track. The first is that we have spent some 15 or 16 million dollars in the development of the Harrisburg field. No other road today comes into that field. We do not feel it is an equitable thing after we have spent all that money to divide the benefits resulting from the development of the field with some other railroad. In the second place, regardless of the immense amount of money we have spent for the development of coal properties in that field we today have materially less facilities for the handling of coal than we actually need, and we do not feel in justice to our own operators any portion of our facilities should be devoted to the handling of coal business for an operator located on somebody else's railroad. As far as transportation facilities are [fol. 503] concerned, I don't think the Big Four is in any worse shape than any other coal carrying lines in the State. We think we are a little bit better, but the fact remains they are far less than the demands and needs of the operators located on our road and dependent on us. It may be true that we serve a great many other mines that are located

just as far away from our right of way in Saline County from this mine or some mines. I don't know the distance, but such mines as you have in mind and refer to are absolutely dependent on us. They could not get out any other way. (Tes. 176-180.)

I think the Harco mine is about 150 feet away from our right of way. That is not a mine track. That is a regular railroad, the Harco Branch. It was constructed for the purpose of reaching a number of mines. There are now 4 mines located on that branch railroad. Originally it was not constructed for the purpose of reaching that one mine. I don't recall when that track was constructed serving these 4 mines from Harrisburg. I think it was about 1917. There are no other industries that I know of besides these 4 mines that that track serves. There may be some others out there; I don't know. The Big Four constructed that track; it is the main line of the Big Four, and it runs from Harrisburg to Harco. I don't know what is at Harco. (Tes. 180-181.)

Cross-examination:

I testified that at the time I had this conversation with Mr. Cardy and I wrote the letter that he has offered as an exhibit, that I did not understand that this track that the mine proposed to build from the mine to the Big Four right of way was to be used either by the Illinois Central or the Traction Line. Frankly, I thought when Mr. Cardy got that letter he had dropped the matter altogether because I could not conceive what good a track connection would be to him without cars or service, and I was telling him all the Big Four would do. I was attempting to answer a specific [fol. 504] question which he asked me personally, to state the limit in which we would go in serving the mine, and the limit was to make track connection. Some year after the letter was written, about the time this matter of making this connection began to be agitated again, it was learned that the Dering people expected cars and expected service at the mine if and when track connection was made. The chief reason why I thought they would drop the matter after the letter was written was because I could not conceive a track connection would be a benefit to anybody without cars or service, which we did not intend to provide. The

first I learned that either the Illinois Central or the Traction Line might use this proposed track was a report made by Assistant General Freight Agent Burgee, dated December 13, 1922, following a conference he had with Mr. Pauley and Mr. Cardy. That was the first definite knowledge I had that either the I. C. or the Traction Line would expect to use this proposed track. It had been rumored in the Harrisburg field some 10 days or 2 weeks prior to that, and those rumors have been reported to me, that the Illinois Central were going to use this track to be constructed by the Dering people, but this report of Mr. Burgee's was the first definite information I had to that effect. (Tes. 181-184.)

In November, 1921, I had absolutely no intimation at all that any other line would use this track. I don't know what the Illinois Central are attempting to do. As I understood Mr. Pauley's testimony, he had given them the right to use this track. I don't know of any other purpose they could use it for than an attempt to get into the Wasson mine by using this track. It would indicate to anyone, I think, that the Illinois Central was attempting to get into our coal district. I cannot see, as a traffic man, how it would be possible for the Illinois Central to give the Wasson mine or any other mine that is now being served by the Big Four any better service than it is now getting through the use of this track. I cannot see that if this connection should be [fol. 505] made and we are forced to furnish cars and service to the Dering mine that it would have but one result, and that would be to deprive the operator who is now dependent upon us for the handling of his coal of just the amount of facilities which are furnished to the Dering Company less than he is given today. If the I. C. should be able to serve the Wasson mine, or some other mine over in that territory, that would deprive the Dering Company of some of the service and equipment that it is getting today from the Illinois Central. It would be just that many more mines to divide the equipment between. According to Mr. Pauley, however, that would be taking nothing from nothing. I do not understand why the mines over on the Big Four should want that nothing that he said the Big Four is able to furnish. It is more economical for one road to serve a mine than to have 2 or 3 roads serving it. That is an operating

matter which Mr. Milligan can testify to from personal observation and being in charge of such operations. There is a little miners' village out there at the end of the Harco Branch, called Harco. This branch also handles freight to that village. The Big Four has spent about $16,800,000 in developing the coal territory adjacent to its line. That is on the coal traffic for the Cairo Division, in the state of Illinois. That represents the amount originally spent for reconstructing that division. That road was rebuilt with the opening and development of the Harrisburg coal field, and that represents the estimated value of the equipment and power which is now devoted to the handling of coal traffic on the Cairo Division. (Tes. 184-188.)

Redirect examination:

It was my statement that at the time I wrote this letter on November 1, that I had no intimation that the Illinois Central or the Traction Line might use this track. Having that thought and the other things in mind I told you, I had no objection to making a physical track connection. After [fol. 606] the track connection was made, I did not have it in the back of my head even though a track connection was made I was not going to give you any service—it was in front of my head. That is, we would not serve the mine under any circumstances or conditions. The Big Four is more than willing to serve every industry on our road. I want to go on record here, even though the Dering mines constructed a switch track to the Big Four, it was not the intention of the Big Four to serve that mine. That is absolutely correct. That is no changed position. The reasons we don't want to serve this mine are, first, because we haven't sufficient facilities to take care of the operators on our own railroad, and we feel in view of the amount of money we have spent to develop that field we are entitled to the benefits. Those are fundamental reasons. There are any number of other reasons. (Tes. 188-192.)

At the present time we have track connection with the Illinois Central at Eldorado. They do not extend beyond Eldorado; that is the end of the branch. Mr. Milligan can give you the exact local situation. A joint mine is a mine served by more than one railroad. (Tes. 192-193.)

(Copy of letter from the Traction Co. accepting the terms and provisions of the contract as submitted, and indicating the changes, received in evidence as Exhibit No. 20.) (Tes. 206.)

(Copy of formal contract with Illinois Central, showing change on page 6 from that previously introduced, concerning construction of proposed track, received in evidence as Exhibit No. 21.) (Tes. 207.)

Motion to Dismiss

Mr. Gillespie: We now move to dismiss this case upon the ground that there is no jurisdiction in this Commission to hear or determine any of the matters presented by the petitioner, for the reason that the record now shows that the proposed track when constructed will be a railroad connecting the Illinois Central Railroad with the Cleveland, [fol. 507] Cincinnati, Chicago and St. Louis Railway Company, and therefore the Interstate Commerce Commission has exclusive jurisdiction; for the further reason that the record now shows that the alleged track when constructed will be and constitute the parts of two main line railroads, the Illinois Central Railroad and the Southern Illinois Railway & Power Company railroad, and will be an extension of their lines, and under the law a part of their railway tracks jointly operated. We further deny the jurisdiction of the Commission to hear and determine any question involved here because so far as the Dering Coal Company is concerned it appears that this company is attempting to construct and lease a railway to be operated for general commercial purposes in excess of its charter powers; it appearing already that the Dering Coal Company is merely a coal company organized under the general incorporation laws of the State of Illinois and has no certificate of convenience and necessity and no certificate of convenience and necessity can, under the law, be granted to it to operate a railroad or to construct, own and lease a railroad.

Mr. Ewald: The Commission will take that motion under consideration. (Tes. 207-208.)

W. T. STEVENSON was called as a witness for respondent and, having been first duly sworn, testified as follows:

Direct examination:

W. T. Stevenson is my name. I am traffic manager of the Big Four Railroad Co. I am familiar with this question from the beginning. I have prepared some matter and a statement I desire to make into the record as my evidence in relation to this transaction from the beginning to the end. As near as can be ascertained coal was first shipped from Saline County about 1902, but the volume moved was negligible. Between the date mentioned and 1905, the potential value of the field became apparent. Beginning about 1905 the Big Four began the expenditure of large sums of money for the development of this coal field, and [fol. 508] the increase in our facilities for the handling of coal traffic has constantly continued to date. In 1905, 1906, and 1907, $6,747,630 was expended in rebuilding the line from Danville to Harrisburg, a distance of 190 miles. In 1910 and 1911, $419,078.00 was expended for double tracking between Lyons and Chrisman, and during the same period $120,575.00 for double tracking between Eldorado and Carrier Mills. Extensive yard and engine terminals were built at Lyons, Mt. Carmel and Harrisburg.

Prior to the above improvements the Cairo Division consisting of a single track road bed, light construction, with mostly timber bridges and heavy grades. The grades made the hauling of large coal traffic prohibitive and the track, roadbed and bridges were of insufficient capacity to carry heavy engines and equipment required for coal business. In addition, the terminals at that time were totally inadequate to handle the prospective increased business to be produced from the coal tonnage.

The construction of the new line was of the most permanent character, the bridges all being made of concrete and steel, having a capacity to carry the heaviest locomotives. The entire line was relayed with 80-pound rail, ballasted with gravel, maximum grade being 3/10ths of 1%, which enables us to haul trains of 5,000 tons northbound. Substantially all 80-pound rail has since been replaced with 90-pound rail, at an additional expenditure of about $87,570; all tonnage trains Harrisburg to Danville now are handled over 90-pound rail. Ample passing track facili-

ties were provided to permit the hauling of long trains of empty coal cars southbound without interfering with the northbound tonnage trains. Interlocking plants were established at all railroad crossings, and where practical, grade crossings of highways eliminated. At Lyons, a terminal was constructed, with yards for north and southbound traffic, repair yard, engine house, turn table, coaling station, water station, track scales, car repair building and other features necessary to an engine terminal. At Mt. Carmel there was built a yard, coaling station, water tank, [fol. 509] engine house, turn table, and extensive shop buildings. At Harrisburg there was constructed a large hump yard with track scales, engine house, turn table, coaling station and water tanks. The facilities just mentioned at Lyons, Mt. Carmel and Harrisburg are now inadequate and must be increased to take care of increased coal production at our mines. In more recent years there has been spent $347,992.00 for additional track facilities to serve the mines. We, therefore, have invested in track and yard facilities no less than $7,722,845 for the purpose of developing our Harrisburg coal field. The maintenance and renewal expense on these facilities is a very large amount per annum. In addition we have expended large sums for the purchase of coal equipment. Our present ownership consists of 16,127 cars of an estimated value of $19,011,585. We have an investment in power engaged in the handling of coal traffic on the Cairo Division of $1,856,010. On the existing mine rating, which is used in the distribution of cars, the Harrisburg District mines produce substantially 38% of the total coal produced on our line. Allocating 38% of the total investment in equipment to the Harrisburg district mines, shows an investment in cars for handling coal from that district of $7,224,402. Add to this amount the investment in power of $1,856,010, and we have an investment in power and equipment for the handling of coal traffic on the Cairo Division of $9,080,412. Adding to the amount just mentioned $7,722,845.00 representing investment in track and yard facilities, it is found the Big Four has invested approximately $16,803,257.00 for the handling of coal from the Harrisburg field. Unfortunately, statistics covering the actual movement of coal from our mines are not available prior to 1908. However, in 1908 we owned 6,343 coal cars; the total tonnage originat-

ing at mines on our line for the coal year ending March 31, 1908, was 3,781,000 tons, of which 2,292,000 tons originated in the Harrisburg district. The last year during which the movement of coal could be considered at all normal, was [fol. 510] during the coal year ending March 31, 1918, at which time we owned 14,121 coal cars. During that year we moved from our mines 6,977,000 tons, of which 4,093,000 tons were produced in the Harrisburg field, but we could not begin to supply the cars ordered. The total daily capacity of our mines is now about 90,394 tons. Using a year of 200 working days the potential capacity per annum is 18,078,800 tons. As previously stated we now own 16,127 coal cars or something over 255% of the ownership in 1908, but we are only able to supply less than 60% of the cars demanded by operators on our line, and it is obvious our coal equipment must be materially increased in order that we may move the production from mines on the Big Four. It is apparent that regardless of our heavy investment and constant effort to increase our facilities for handling coal, we have been unable to keep pace with the increased production at mines on our line. For these reasons we feel that the operators now located on our line are entitled to the maximum use of all of our available facilities for handling coal. (Tes. 213-219.)

I had something to do with the application of the Dering Coal Co. for this service. Immediately following the decision of the Interstate Commerce Commission in the complaint filed by the Dering Coal Co., and which decision was received about August, 1921, I had a conference with Mr. Cardy, representing the Dering interests, and at that time he urged that some arrangement be made whereby the Big Four would serve the Dering mine. This mine involved here. I was aware of the fact at the time that Mr. Pauley had been in touch with Mr. Worcester, Vice President, and advised Mr. Cardy that in view of Mr. Pauley's negotiations I was not prepared to discuss the matter officially; that personally I felt that our position had been fully outlined at the time the case was heard by the Interstate Commerce Commission and we should not change that position. Mr. Cardy asked that I get in touch with Mr. Worcester and as soon as possible advise him the limit to which the [fol. 511] Big Four would go in serving this mine. After discussing the matter with Mr. Worcester, I wrote Mr.

Cardy in November, I think, the letter which Mr. Cardy presented as an exhibit in this case, I don't recall the number, and in that letter in response to Mr. Cardy's specific question as to the limit to which the Big Four would go in serving the mine, I said we would be agreeable to making track connections. Nothing was heard of the matter from that time for about a year when negotiations were opened for the track connection. Our Mr. Burgee, Assistant General Freight Agent of the Big Four in Chicago, had a conference with Mr. Cardy and Mr. Pauley in reference to the matter and at that conference it developed that the Dering people were anticipating that the Big Four would furnish cars and serve the mine, in addition to making track connections. Mr. Burgee reported that to me. Subsequently Mr. Pauley had a conference with Mr. Worcester and Mr. Worcester stated to Mr. Pauley the Big Four were not prepared to make track connections. Following that this complaint was filed. (Tes. 219-221.)

So far as I am concerned, in none of these negotiations was any such plan or scheme as is disclosed by these contracts with the I. C. and with the Southern Illinois Railway & Power Co. stated or disclosed to me; I was not present at all the conferences Mr. Pauley had with Mr. Worcester but from the information given me by Mr. Worcester of those conferences no such arrangement was ever mentioned to him. Some time between the 1st and 10th of December, 1922, it was reported by our representatives in the Harrisburg field that the I. C. were going to build this track. In the conference which our Mr. Burgee had with Mr. Cardy and Mr. Pauley, to which I made previous reference and which was reported to me by Mr. Burgee under date of December 13th, Mr. Burgee advises he was informed that the I. C. would be permitted to use the track. That was the first official information we had of it and that was con-[fol. 512] firmed by Mr. Pauley in the conference he had with Mr. Worcester in Cincinnati, a few days later. The first information I had concerning the rights sought to be conferred upon the Southern Illinois Railway & Power Company by these contracts was at the last hearing or the one previous when it was mentioned in this proceeding. With the transportation facilities the Big Four has, they can keep their lines running something less than 60% of the

running time in Saline County. I would rather you get the detail of that from Mr. Harris—to be exact it is about 58%. I stated the limit our company was willing to go in September or November, 1921, was to merely make this track connection. We had no intention of furnishing service.

"Q. Can you name one industry or coal mine which has a physical track connection with the Big Four Railroad Co., wherein the Big Four does not furnish transportation facilities, either in the State of Illinois, Indiana or Ohio?

"A. If I understand your question there are many such instances.

"Q. Just give us one of them.

"A. We have many cases."

We have many industries where they have a private siding from another railroad where the railroad does the switching and delivers the stuff to us. Under those circumstances, we might furnish the car but we would not begin to furnish transportation facilities. The reason is that some intervening carrier does the switching service from the industry or mine to the Big Four. I don't know of any case where we do the switching. There may be such cases but I don't know of them. I don't know of any case where the industry is located on the tracks of another railroad where we do the switching. We furnish transportation facilities, and by that I mean motive power and equipment, from the point of connection with the siding and our main line. At the time we said the track connection would be agreeable to [fol. 513] us, it contemplated you getting the cars from somebody else and getting those cars over to us through some other means than Big Four facilities.

"Q. But this track connection would carry with it any transportation facilities which the Big Four might have and which it gave to other industries and mines similarly situated where there was an industry track leading off from the main line of the Big Four, whether or not the industry handled the traffic over the spur track to the main line of the Big Four, understanding that you had track connection contemplating all the usual service the Big Four usually gave under those circumstances?

"A. No, sir, not at all." (Tes. 221-226.)

There is no industry that I know of on our railroad or connected with the railroad that is similarly situated to what this would be if the connection should be allowed. There is no analogy whatever with the Brady Coal Co., located at Danville on the Illinois Traction Co., about 4 or 5 miles from the railroad. We furnish the cars to the company. The Traction Line does the switching. We have furnished the cars. We take the cars from our tracks. I don't think that situation is at all comparable with this; we put a car on a track and the Traction Line gets it and delivers it back to us and we handle it as a local shipment. If the Dering Coal Co. switches the cars from the line to the main track of the Big Four that situation at the Brady Coal Co. would be somewhat similar with the contemplated situation at Eldorado. I never have been able to get clear on who was going to perform the service between the mine and our line. We don't want to go off of our right of way or pay anybody else for performing that service. As long as you furnish your own cars and don't call on us for them, whether the Dering Coal Company does it with its own engine or has somebody else do it is immaterial to us. (Tes. 226-228.)

R. R. Harris, called as a witness by respondents, being first duly sworn, testified as follows:

[fol. 514] Direct examination:

My name is R. R. Harris. I am superintendent of Freight Transportation of the Big Four and have been since January 1, 1914. In a general way, I am familiar with the Harrisburg district. Particularly as regards car supply, I know something of the service rendered to the Harrisburg district by the Big Four Railroad Company. To show the general situation, I have had some figures made up from the reports covering the period January 1, 1916, to January 1, 1923, showing the rating, the cars ordered, cars furnished, per cent of cars furnished based on the rating, and per cent of cars furnished based on the cars ordered. The per cent of cars furnished based on the rating was 79.7 per cent; per cent of cars furnished based on the cars ordered was 80%. In that we had one year, 1921,

when we had 100% car supply for the entire year. These figures I have given deducted that year but I have the figures including that year and for the whole period still leaves a car shortage. Cars furnished based on the rating was 77.8 per cent, including 1921, and the per cent of cars furnished based on the cars ordered was 82.8%. I have taken another period from August 23d, the day the mines resumed operation, to January 1st, and in that period we furnished a percentage of cars, according to the rating, of 66.7%, and percentage of cars furnished on orders was 69.6%. That covers the whole period. We have frequent days in there that our car supply has been less than 40% and when I say that for the Harrisburg district, don't get the understanding that don't apply to all the districts. We keep them as close together as possible, and they don't vary over 1 or 2%. I have a typewritten statement showing these facts I have testified to.

(The statement referred to was received in evidence as Respondent's Exhibit 1.) (Tes. 229-231.)

[fol. 515] I believe that about 75% of the coal that is produced in the Harrisburg district on lines of the Big Four Railroad goes into Chicago and the Chicago district. I haven't the figures on that. I don't know from my knowledge of the layout at Harrisburg whether our facilities there are in excess of demands of the company for service when the maximum demand is reached in handling coal.

Cross-examination:

For the year 1921 our company furnished transportation facilities so the operators on the Big Four could run 79.7% of the time, based upon their rating, and that was due to the fact operators that year on account of the low demand for coal, did not order up to their rating. Our distribution is really based upon orders with the rating as a guide. In the districts on the Big Four we don't confine ourselves exactly to the rating. Upon cars ordered that year, we furnished 80 per cent. We were talking about the year 1921. The cars furnished based on the orders was 98.8%; that's the year I said was practically 100%. In 1922, they were furnished 78% of their rating and 81.2% of the cars ordered. From investigations we have made as a result of

the rating cases coming up and new rating rules, I would say our mines are very little, if any, overrated. I have figures for that I can present. It was acknowledged at Washington at a meeting held there that due to our system of using the Round Robin distribution plan it overcome the possibility of overrating coal mines. We use the round robin system over our entire division. The round robin is not in effect at Harrisburg and other points in the sense it is in the Harrisburg district. We have one operator in the Harrisburg district who wants to continue under the percentage plan. When the other mines in the district return to work, we give them a full run of cars. I have no knowledge that I would want to testify to as to the amount of inflated ratings that generally apply at coal mines in the State of Illinois. I have heard statements to the effect some mines were badly overrated. That is the purpose of [fol. 516] the investigation of the Interstate Commerce Commission—to cut down the ratings of coal mines. Our company is one of the respondents in that proceeding. We are the same as any other coal operating railroad. I want to make it clear I have not asked to be a witness in the case. It is a general investigation in which our company is voluntarily appearing. 75% of the coal in Saline County moves to the Chicago territory and beyond. The other 25% goes locally, and some via the St. Louis division and Indianapolis territory. 75% doesn't go to points in Illinois, altogether. 75% goes to Chicago and other territory beyond, and some of the other 25% goes to Illinois and some to Indiana. I could not say what percentage goes to points in Illinois. (Tes. 229-236.)

There is no doubt there is quite a good deal of Illinois coal used in Indiana, but that's a small percentage of the total amount of coal. I meant Illinois; there is quite a little in Indiana, some in Missouri, some in Kentucky and Iowa and other states. I expect we do handle coal to practically every station in Illinois on the Big Four that originates in Saline County; it is a large volume. (Tes. 237.)

Mr. Stevenson, recalled, testified as follows:

Coal mined in the Harrisburg district and shipped on the Big Four Railroad is shipped pretty well over all of the

country, but there is only 8½% of it, using the first 9 months of this year as a typical period, which is consigned to local points on the Big Four. By local points, I mean any destination which is reached by the rails of the Big Four. In other words the coal is transported from Harrisburg to destination exclusively over the Big Four Railroad. That would include coal going to Peoria, Blooming-ton, Pekin and all common points. The common points that I designated as local include Bloomington, Pekin, Peoria, which are reached by the I. C. It includes Champaign, Mattoon, which are reached by the I. C. It includes East St. Louis which is reached by the I. C. The Illinois [fol. 517] Central can reach, generally speaking, all the territory that we reach except probably points on our Cairo division between Harrisburg and Division, and they reach some of those, for instance, on the Clover Leaf. I haven't the information to show what per cent of coal that originates in Saline County and shipped via the Big Four, goes to Chicago and points beyond Chicago; I could have an exhibit prepared and submitted. When I tell you only 8½% of the tonnage moves locally on the Big Four all told you can see that the amount moving in Illinois is comparatively negligible. That does not include coal to Chicago; coal from the Harrisburg District which we haul to destination points, whether in Illinois, Indiana or Ohio. What I am pointing out, those figures are available now but to go over that and segregate that part of the local tonnage in Illinois we have to go over the billings. That only includes destinations located on the Big Four. I can give you the total tonnage originating in Saline County moving to points in Illinois, whether on destinations of the Big Four or connecting lines, leaving out the Chicago territory, as far as business destined beyond our line is concerned. We have the tonnage to Illinois off of our lines but not to points on our lines and there is only 8½% to points on our lines all told, Indiana, Michigan and Illinois. (Tes. 238-242.)

Based upon a tonnage of 4,000,000 tons, 8½% of the tonnage originating in Saline County would be just about 32,000 tons. I think that's true to say that Illinois out of that 8½% gets its fair proportion of the tonnage; there is more or less movement into Indianapolis but my judgment would be most of the 8½% moves to points like Peoria,

Pekin, Bloomington, Champaign and points that are available to mines on the I. C.

"Q. And every other local station on the Big Four Railroad that uses a car load of coal?

"A. I would not say the bulk of the movements was to such stations."

[fol. 518] In addition to the movements to Peoria and these stations mentioned, the movement would include movements to every other local station on the Big Four that gets a car load of coal, if any went there, but I doubt if any coal from the Harrisburg District goes to points, say, St. Louis, for instance. I would not hazard a guess as to the average freight rate from Saline County to points in Illinois. I haven't the slightest idea what the minimum freight in Illinois is for the movement of coal today—in the State of Illinois. I don't know that from 70 to 80 cents a ton is the minimum rate; freight rates have been changing so fast. I don't know what the Illinois Distance Scale is for 2 miles; I have not seen the present scale since it has been issued. I don't know the general level of short haul rates in Illinois is 70 cents, and I don't know that the general level in Indiana is 55 cents for short hauls. I don't know what the freight rate is from Chicago to Saline County. I have been in the traffic department of the Big Four for about 27 years, but I have not had a thing to do with coal rates for nearly 3 years. I don't remember the minimum coal rates in Illinois 3 years ago. We have an official who handles coal rates. (Tes. 243-245.)

H. F. Milligan was called as a witness by respondent and, being first duly sworn, testified as follows:

Direct examination:

My name is H. F. Milligan; I am superintendent of the Cairo Division located at Mt. Carmel, Ill. I am familiar with the Harrisburg district, and I know what facilities are there. We have an empty receiving yard, a loading yard and a hump yard just north of Harrisburg for hand-

ling coal that is produced and shipped on our line. When coal is produced in the mine and brought from the mine it is taken to Harrisburg. There it is billed, humped and trained out. Between Harrisburg and Eldorado for the handling of coal there are two tracks. They are both main tracks. They are operated by our train dispatcher. The [fol. 519] trains, our regular trains, move over both tracks. In addition to that the coal is moved over these same tracks. We have 13 engine at Harrisburg and Eldorado for the local handling of coal. Those engines work in the Harrisburg yard and mines adjacent to Harrisburg. There are 23 mines at Harrisburg, located north and south of Harrisburg, and on the Saline Valley Railroad, which is a main track railroad between Harrisburg and Harco and between Harrisburg and Big Creek No. 4 mine. It is a main line. There is a junction 2 miles south of Harco that goes to the Big Creek #4 mine, but that's a main track. It is a main track that branches—two branches. It is 10 miles long, and it is operated by the yardmaster entirely. There are no other operations than our own over that road. We handle some l. c. l. business to Harco and of course the mine props and other things necessary for the mine. There are 4 mines on that line. Our maximum grade on this railroad in handling coal in that territory is 1%. The addition of a half per cent upon the transaction of business as to any particular mine or place would simply lessen the tonnage to be handled by at least 12 to 14 cars. That would mean an additional trip to the mine with an engine in the number of operations necessary to handling a day's business. Our facilities are not adequate at the present time to handle our business. That is true with reference to locomotives and train crews, as well as the yards. If this track should be connected with the Big Four, and we were required to handle that coal from the mine to the connection and to Harrisburg, we would have to add at least two additional engines and additional track facilities at Harrisburg. I have made an examination of the proposed location of this track across the Illinois Central and its connection with the mine tracks of the Dering Coal Company. They enter the Dering Coal Co. on a heavy curvature, crossing the Illinois Central, according to the blueprints I have seen and according to the stakes—we have walked over it recently

[fol. 520] as staked out by the Illinois Central Railroad engineers—at the point of crossing of the Illinois Central there is a heavy curvature in both directions, possibly 2 to 2½ degrees. In coming into this mine from Harrisburg the view is obstructed from the mine tipples from the high tracks and from the opposite direction the view is obstructed by a very heavy woods which would make it imperative in operating over that crossing for an interlocking plant for protection. In other words, if I sent my cars to operate over that piece of track I would be forced to flag in both directions and would have but one man left with the cars to do the work, which is very objectionable. The crossing also, as I understand it, gives the I. C. a connection at the crossing. I would positively refuse to operate over it only by using a flagman. I would send a flagman ahead, which would reduce the speed from 4 to 5 miles an hour in each direction, unless we could put a train dispatcher on to handle it entirely. It would be a very poor operation to handle with other than train dispatchers because of the fact the 3 lines would be using it and you would have no schedule. In fact the Commission would not permit us to use it without train dispatchers or flagmen. The same element of danger would exist as in the operation with the Illinois Central and the Southern Illinois Railway & Power Co. (Tes. 246-253.)

Cross-examination:

Eldorado is located approximately 10 miles north of Harrisburg. Between Harrisburg and Eldorado are two main tracks, as I call them. We run north and south there. The easterly track is used for both. We use them both in both directions governed by the current of traffic. Taking the track lying most easterly of these two tracks, that begins at Eldorado and ends at Harrisburg, where it runs into the assembling yard. At Eldorado it connects up with the interlocking plant. It connects into the only main track [fol. 521] there. We have double track between Danville and Christman. Passenger trains use the easterly track between Eldorado and Harrisburg. Trains operate over that whenever it is necessary; four passenger trains a day. You are going with the current of traffic, you would use the other track. On southbound traffic you cut off from the

main line at Eldorado when necessary and go in on this siding and then cut in again at Harrisburg. It is not a usual ordinary railroad movement. This most easterly track is not used when necessary as passing track—as a running track. Whenever you cannot use it with the current of traffic, it is necessary to use that track for passenger trains. If there is a train northbound you run the southbound one around it. If no train northbound we use the easterly track—the same as any other double tracks movement.

"Q. Along this most easterly track are located two or three coal mines, the two O'Gara coal mines and the Wasson coal mine, I will ask how the industry tracks from those coal mines are connected up and whether the switching connection from those coal mine tracks do not connect up in substantially the same manner as the blue prints indicated in this case?

"A. They would." (Tes. 254-256.)

I don't know your proposed location. I don't know as to the spur track. I don't know as to the connection; there are two proposals as to the connection. The Wasson track connection would be a trailing switch on the movement of traffic southbound. I could not say if the proposed switch connection here would be a trailing switch. I don't know which way the switch is going to operate—there are two distinct plans. Looking at the blueprint attached to the complaint, the switch connection there proposed, or either of them, differs in no way whatever with the switch connection a few hundred feet north leading into the Wasson mine. There is always an increase in the hazard when you have an opening in the main track. From what I know of the blueprint, outside of an additional switch, that is the only hazard. Our company serves 23 mines in Saline County now.

[fol. 522] We have 13 switch engines at Harrisburg handling coal exclusively. I am taking the position that to serve one additional mine, I believe we would have to have 2 more locomotive engines, on acount of the 1½% grade. We handle 30 cars over the Harco grade, and a 1½% grade would reduce it approximately 8 cars—make probably one additional trip. To do that I believe we would have to ac-

quire two additional locomotives. We have approximately 18 miles of yard track at the Harrisburg assembling yard now. We are at capacity now. (Tes. 256-260.)

An interlocker at the crossing between the proposed track and the Southern Illinois Railway and Power Company's track would be the sensible way to handle it to lessen the hazard that would exist by reason of crossing with the proposed gates. An interlocking plant would lessen the hazard; is the proper way to handle it. My experience taught me it is hazardous to operate over the connecting line without an interlocking plant. The Big Four operates over the line at a point in Saline County. We have gate protection and crossing stop. There is a certain hazard you cannot get away from there. Nevertheless we are operating daily over that. We have had accidents there—they have run through the gates on several occasions. Mr. Kissell can tell you how long we have been operating. (Tes. 260-261.)

J. E. Kissell was called by respondent and, being first duly sworn, testified as follows:

Direct examination:

My name is J. E. Kissell. I am Division Engineer and Maintenance of Way, Cairo Division of the Big Four, located at Mt. Carmel, Ill. I am acquainted with the Harrisburg district and have gone over the proposed track. I have made an examination of that track with a view to ascertaining whether it is a safe track or not, for operation between the lines of the Big Four and the Dering Coal Co., or would be if constructed according to the plans. From [fol. 523] my observation the proposed crossing with the I. C. in the vicinity of this mine would be particularly hazardous. The mine tracks are located on a curve. The proposed track to the Big Four should be constructed on an 8-degree curve. The I. C. main has a curvature of about 2 degrees, the view to the east on the I. C. is particularly bad on account of the mine tracks obstructing the view, also the curvature extends to such a distance as to make the view of the crossing bad. From the east on the Illinois Central, the two degree curve extends about 1,500

feet. It would naturally be hard to get a good view of the crossing were there no other obstructions, however there is a heavy woods located at this point which obstructs the view. The proposed grades of 1½%, as shown on these plans, is excessive for handling the number of cars which probably would have to be handled. The crossing with the traction line is like all other traction line crossings. I think the proper protection at this point would be an interlocking plant, the same as should be provided at the Illinois Central. I have made an estimate to ascertain what it would cost to put in these interlockers. An interlocking plant at the I. C. crossing would cost approximately $17,100. and at the Traction Line crossing $15,200.00. This proposed track would cost $2,080. which track extends from the point of switch to the right of way line of the Big Four. This proposed connection would make additional service on the main line of the Big Four. We are operating main line trains over this track and every additional service cut you have there increases the hazard. I don't know, even approximately, how many cuts we have now between Eldorado and Harrisburg. We serve 3 mines. This track connection would increase the hazard. I did not answer your question fully as to the extra hazard involved. In addition to this matter of operation, every switch you put in your main track increases your hazard that much, in addition to that this layout, as proposed, provides that this track will be located on an 8 degree curve [fol. 524] leading off of the big Four track. That curvature would add to the hazard, putting cars up one track or taking them away. (Tes. 261-266.)

H. P. Millman, previously sworn, was recalled by respondent and testified as follows:

Assuming that this track would be operated by the Big Four, the Illinois Central and the Southern Railway & Power Co., an electric railroad, and that the Illinois Central built spurs, additional spurs and added additional mines or rendered additional service along the line wherever desired, in my judgment, such operation would be absolutely unsafe with the 3 lines. It would not be safe to operate with 2 lines without a series of train dispatches.

I cannot recall right now of any railroad in the state of Illinois where one or two or three railroads use the same track. They don't use it without train dispatchers. I have no knowledge of those in Williamson and Franklin counties, serving the same mines down there. Main lines and running tracks are always operated by train dispatchers. The track at Harco is not operated by a train dispatcher; that's their own operation. That's a main track. It is governed by the general yardmaster. The determining feature in a main track, service track or side track is the operation. Main tracks are absolutely always operated by train dispatchers. Tracks not operated by train dispatchers are not considered main tracks. The distinction between a main track, side track or spur is in the operation. (Tes. 266-268.)

Mr. Pauley, recalled, having been previously sworn, testified on behalf of petitioner as follows:

The Dering Coal Co. has acquired, made arrangements for the right of way from Dering Mine #2, to the right of way of the Big Four, along the lines substantially shown in the blue print hereto attached. At the time of the first hearing there were one or two little pieces which were then not absolutely determined. Since that time they have been and we have options on a complete right of way and all but [fol. 525] a few hundred feet of the second right of way. The proposed track will be constructed along substantially the same lines as shown in the blue print. And the connection with the Big Four will be at substantially the point asked for—possibly 100 or 200 feet either one way or the other.

On page 7 of the transcript, about half way down the page it shows that the testimony indicates "there are a number of steep grades." Steep was not the word that I used in that. I would have used some word that would indicate small or slight grades. On page 10 near the bottom of the page the testimony indicates 40% of the coal that goes out of Saline County is shipped by the Big Four; previously on page 4 it shows 95%; 95% is the correct amount according to my testimony. (Tes. 268-270.)

J. PAUL CLAYTON was called as a witness on behalf of the respondent and, being first duly sworn, testified as follows:

My full name is J. Paul Clayton. I am Vice-President of the Southern Illinois Railway and Power Co. Vice-President and General Manager. From this blue print attached to the petition, I am acquainted with the matter in which it is proposed to cross the tracks of our company; and also by a detailed discussion with Mr. A. H. Fazreau, General Superintendent of our company. He operates the company directly located at Harrisburg, and reports to Mr. Shimer, who reports to me. I am acquainted with the ground myself and can testify as to the conditions on the ground—as to the particular thing I expect to testify to. In that connection, I have been in this capacity slightly over 4 years, and have been over this railroad in detail a large number of times. It is my duty to pass upon all requests for new construction, maintenance and repairs of this line, and I do this and make inspections trips over this road at least once a year, sometimes more. I made one such trip last Friday morning, but not over this end of the line. The blueprint here shows, and Mr. Fazreau stated to me—on last Friday morning I visited this road —. [fol. 526] (Tes. 316-318.)

I received a report from our superintendent, Mr. Fazreau, in the line of his duty of reporting to me, concerning this railroad. Mr. Fazreau reported to me that if the proposed crossing was made in accordance with the track which is now along on both sides of the right of way of this company, that the nearest crossing frog on that crossing would be 30 feet from the switch points of our company's spur track. The plat doesn't show the distances. You can only get that by scale. He also reported to me that in the conduct of the railroad company's transportation business it was frequently necessary to pass trains at this point, and that when these trains back out on the spur track there was not sufficient distance, as the crossing track is now laid out, for those cars to clear that crossing and reverse and go down the main track. My opinion on the report made by Mr. Fazreau is that when a car of passengers, or cars, have to be stopped in the regular course of a railroad business on a railroad track, regardless of its protection, is dangerous and should be prevented. Nothing

can protect a crossing in the way of signals when the human element fails. That occurs frequently. That situation has also occurred in my own experience in connection with railroad operation. These things occur in usual and ordinary railroading. The Southern Illinois Railway & Power Co. is not willing that the Big Four have a right to a crossing which requires the Southern Illinois passenger cars to stand upon regular switching upon that cross track. In this connection I wish to state that no representative of the Big Four at any time ever conferred with any representative of the Southern Illinois Ry. & Power Co. about locating a crossing that would obviate dangers of this kind. Our experience with most railroads on this matter is that they do confer for co-operation, but it has not occurred in this case. The service on this line is hourly in both directions. The result is that there are frequent trains crossing this track, and frequently trains have to [fol. 527] use this spur track for passing purposes. (Tes. 318-323.)

Those trains are both passenger and freight. The hourly service refers to the passenger service, and the freight service is in addition to that. I can't say exactly what the over-all length of our passenger coaches is, but they are between 40 and 50 feet, according to my best judgment. They are double truck, heavy cars, with four motor equipment, built for multiple unit operation, standard master car builder's construction. This railroad handles standard railroad equipment at all times over this line in connection with its business. The road now owns and has in use 12 standard coal cars. It has ordered 6 more coal cars and 2 standard cinder cars. The Traction Line connects with another carrier; it has a physical connection with the Illinois Central in Eldorado, which has been used since 1912 or 1913, when the road was placed in service, and it exchanges freight with that railroad practically every day. It exchanges carload lots. It carries freight cars which it receives from the I. C. into such points as the Muddy Power station, stuff to Harrisburg, Carrier Mills, and wherever this company has a siding on which it can be received. The company has a traffic agreement with the I. C. which covers through rates and interchange of equipment on practically all commodities. That doesn't

mean coal; coal is not included, but practically every commodity but coal; and a great deal of such loads are handled. For instance, the company brought into Harrisburg the majority of the road material used for paving in the city; crushed stone, sand, and material of that kind. It brings in daily one to three and four box cars, for which we change freight from the Illinois Central, from Chicago and St. Louis. That agreement we have with the Illinois Central would be of advantage to the Rhondda Coal Co. if it was changed to include coal. The way it is now, yes. The Rhondda Coal Co. could arrange to ship cars over this road to the I. C. on a differential in freight, which is an ad- [fol. 528] vantage to us. There would be freight charges in addition to the freight charges of the Big Four, but that is still an advantage because we have requests for that service. This company handles standard equipment. It owns and operates a 42-ton electric locomotive, not very different from the power of many of the switch engines that the Big Four uses in this vicinity; and it handles whatever traffic is brought to it. It has one connection with the I. C. in Eldorado and is now building a second one. Tentative negotiations have been started to include coal in the commodities exchanged under this agreement with the Illinois Central, which would give advantage to all industries on this line if the negotiations are successful with the Illinois Central. I wish to say that other railroads have taken up with this railroad the question of asking physical connections for interchange of traffic; the Louisville & Nashville being one, at Eldorado. Negotiations are now pending with them for such a connection. This road is different from the Central Illinois Traction Co. in the extent of its freight business. This railroad does do a considerable freight business for a railroad of this kind. It is built with steel, sufficiently heavy and with proper ballast and bridges to handle heavy equipment, and at times the standard steam locomotives of the Illinois Central have gone over this line hauling freight. And it is in every way equipped by grades, curvatures, locomotive power, switch track connections to serve the public with standard equipment, and it does so every day, in considerable quantities. I might say that the Central Illinois Public Service Co. owns and operated a power station at Muddy, about 2 miles north

of Harrisburg, which is only reached by the rails of the Southern Illinois Ry. & Power Co. That power station is of 25,000 kilowatts capacity, and is the largest electric power station in operation in Illinois outside of the city of Chicago and vicinity. All of its equipment of every kind and character has to come over this line of railroad, much of it received from the Big Four. This includes material such as turbines, turbine parts, transformers, requiring [fol. 529] heavy cars to transport them, of very much higher capacity than standard railroad equipment, and that equipment of every kind and charcter is handled over this road for this power house. Its supply of coal is also received over this railroad. Its most recent purchase of cars were purchased from the Big Four, standard M. C. B. equipment, and now in successful use on this line. (Tes. 323-328.)

This power station requires every day between 250 and 300 tons of coal. It will require more in the future as the load increases to the capacity of the station. We use 250 and 300 tons per day, which is equivalent to the entire output of a mine such as the Rhondda Coal Co. If the Central Illinois Public Service Co. would purchase coal for this station, and the tracks installed without connection with the Southern Illinois Ry. & Power Co., it would be necessary for this coal to be put on the line of the Big Four to Eldorado, switched over the line of the I. C. for about 500 feet, for which an additional switching charge is made, and from the line of the I. C. switched on to the line of the Southern Illinois Ry. & Power Co. The total actual distance from this proposed crossing to the power station is no more than 4 or 4½ miles, but the movement necessary as proposed would be a total distance of something like 16 or 17 miles, with 3 freight charges to pay, instead of one. This company, I wish to say, the Central Illinois Public Service Co., is a very large buyer of fuel, and in fact did supply itself from a mine near the Rhondda Coal Co. for some years. Mr. Rueben Williams here proposed to the Central Illinois Public Service Co. about 2 years ago that we purchase from him a mine sought to be developed here, or if not purchase that, to purchase the output of that mine, and at that time he was seeking a connection with the rails of the Southern Illinois Ry. & Power Co. so that such coal

could be delivered. I don't understand yet that he refuses to consider selling coal to the Central Illinois Public Ser- [fol. 530] vice Co. if that company agreed to buy it, but it would be obviously impossible for such coal to be delivered in competition without other Saline County coal unless this "Y" connection is made. The Southern Illinois Railway & Power Co. has track connections with a number of mines along this line, in addition to the track connections of the Big Four, and all of these track connections have been made at the request of the coal operators who desired additional rail facilities, and also an opportunity to sell their fuel, as they are in the same business Mr. Williams is in. We have at the present time track connections into O'Gara #10 mine in Eldorado. That is not a connection across our tracks; nor is it a connection with the Big Four. Their location is slightly different but we have these track connections into the mine in addition to the rails of the Big Four and the I. C., who serve the same mine. That was made in the city of Eldorado. #10 is located at the junction of where the I. C. and the Southern Illinois pass, but the Big Four also has a track into that mine. There is a site about to be built—already before the Commission—where the tracks of our company cross the tracks of the Big Four. The Dering Coal Co. has been before the Commission, and the Commission issued an order to that company to construct a track from the mine of the Dering Coal Co., Northwest of Eldorado, across the track of the Southern Illinois Ry. & Power Co. and to connect with the tracks of the Big Four. This company has entered into a contract with the Dering Coal Co., which contract is on record with this commission, for equal user rights on this switch track on equal terms with the Big Four and the I. C. The situation is identical, namely, the cars of the coal company, to get to the Big Four, first cross the line of the Southern Illinois Ry. & Power Co., exactly as this crossing. But there the Dering Coal Co. was willing and anxious to make "Y" connection with the Southern Illinois Ry. & Power Co., and there the Dering Coal Co. did not enter into a contract with the Big Four for any exclusive rights of this [fol. 531] switch, because they have built this track and intend to have it used by whoever may want to use it. They

have not parted with their rights, as has the Rhondda Coal Co. (Tes. 328-333.)

Our position is that neither the Big Four nor the Rhondda Coal Co. have a right to attempt a right of way across the line of this company or to across [cross] in any way, but we are willing to waive that right if the Rhondda Coal Co. as the owner of this track, and the Big Four as a contractual party with this coal company, agree that the Southern Illinois Ry. & Power Co. may have an equal right of user without objections from them to this track owned by the Rhondda Coal Co. and paid for by them. Now, in other cases, such as the Dering Coal Co., which is before the Commission, on which it has entered an order, the same question was entered into, but here we had a different attitude on the part of the Dering Coal Co., apparently, than that of the Big Four in that they made no objection. That was the petition of the Dering Coal Co., Illinois Central and the Southern Illinois Ry. & Power Co. I don't remember the number of that case off-hand, but the I. C. Railroad entered no objections similar to these people. It agreed to equal right of user on this switch with themselves on the part of the Southern Illinois Ry. & Power Co. I wish to also to make it clear in such an equal right of users the Southern Illinois Ry. & Power Co. is willing to enter into an equitable contract for apportioning the cost of the "Y" track, and is willing to itself spend the money for the overhead electric connections, which will not cost anything to the coal company, which will be of sufficient clearance for all trains of the railroad company; and also to enter in an agreement regarding the maintenance of this track in proportion to the cars handled over it. The position of the company briefly is simply this: It is a railroad, organized under the railroad act of this state. It is a com- [fol. 532] mon carrier in the intent of its operation and its actual practice. Its motive power is electric motive power, instead of steam, which is a matter of its own choice in its management. In endeavoring to serve the public with freight and passenger service along its line the company has endeavored to make every connection that every other common carrier does under those circumstances. It has met with encouragement and co-operation with the I. C. Railroad, and the L. & N. Railroad, but it has been met

always in opposition by the Big Four. Whether or not the position of the Big Four to this railroad alone, or to any railroad operated by electricity as a class, I don't know, but we have met with the same difficulty in their attitude in the case of the Central Illinois Traction Co., of which I am also vice-president; and there I was informed that it is the policy of the Big Four not to cooperate with those companies under any circumstances. I had conversation with 2 representatives of the Rhondda Coal Co. relative to the use by our company of this track; the first one was Mr. Rue, and then with Mr. Williams. (Tes. 335-336.)

Mr. Rue called me on the telephone possibly a week before the last hearing, from St. Louis, I think he said, and asked whether we would be willing to consent to making this crossing in advance of the hearing before the commission, so that they might get out coal. I told him that we were willing to agree to a crossing immediately provided the cost of this crossing and its maintenance was not to be borne by the Southern Illinois Ry. & Power Co. He stated that was not important because the Rhondda Coal Co. had already paid for the crossing and had to maintain it under their agreement with the Big Four. I also stated that we would not consent to the crossing unless they would agree that this company would have the right to make a "Y" connection with their private road at any time in the future, with equal rights of user with [fol. 533] the Big Four. He said he had no objections to that, but he thought the Big Four had some. He wanted to know, therefore, whether we would go ahead and let that connection be made prior to the hearing, and I told him that we would not do so if the petition of the Big Four and the Rhondda Coal Co. were as stated in the petition on file, of which we had received a copy. Right here I wish to state that that petition, as I understand it, provides that the Southern shall pay for this crossing. That contract, as I understand it, provides that the Southern Illinois Ry & Power Co. shall pay for this crossing and its future renewal and maintenance, notwithstanding the fact that the Rhondda Coal Co. has already paid for it, and according to its contract with the Big Four must maintain it and renew it in the future. When I say I understand it

provides, I mean that the Big Four contends that in their petition. In other words, as we understand the contract, notwithstanding the fact that the Rhondda Coal Co. has already paid for it, and is going to renew it in the future, the Big Four says they have the right to make us pay for the same crossing that is already paid for. I therefore told Mr. Rue that we would not agree to it under those circumstances. Subsequently Mr. Rue visited my office and we had a conversation in which I explained further that the company had no wish to cause any delay in making this crossing, provided the Big Four would agree we would not have to pay for the crossing already paid for by the coal company, and for its maintenance; and also provided that a contract would be entered into by the coal company and the Big Four permitting the "Y" track. Mr. Rue said personally he would be in favor of that kind of track. He said he would visit Mr. Gillespie and see whether the Big Four would be in favor of that. He returned after that and said that the Big Four would not approve any arrangement of that kind, although he said to me that he had urged that they do so, because the duplicate use would be [fol. 534] in favor of the coal company. (Tes. 336-339.)

Subsequent to that Mr. Rueben Williams, and when I say Mr. Williams, I mean Mr. Williams as the same gentlemen I have already referred to as having offered the Public Service Company this mine. My memory is that he also offered to sell the mine as well as the coal. In either event a switch track would be necessary if his wishes were acceded to. Mr. Williams had with him a copy of the contract between the Rhondda Coal Co. and the Big Four, and also a letter from Mr. Paquette, chief engineer of the Big Four, which he showed me. Mr. Williams stated to me in our conference that Mr. Rue had told him the previous conversation, and Mr. Williams stated that he had taken the matter up with the Big Four, and showed me a letter from Mr. Paquette, chief engineer, which bore on this point, namely user rights, and Mr. Paquette stated that the contract as drawn did not permit any connection between the Southern Illinois Ry. & Power Co. and the Rhondda Coal Company's switch except with their consent. The contract I refer to is the one with the Big Four. And it was the further desire of the Big Four to maintain the exclusive

monopoly and use of this switch track, but if they had to they would consider allowing the Southern Illinois Ry. & Power Co. to use the switch. Mr. Williams further stated that Mr. Emig stated to him that they would not hold the Rhondda Coal Co. from operating the mine and they would consider giving up this exclusive right in the contract, and not hold up the Rhondda Coal Co. in the operation of their mine.

He further stated that his agreement with Mr. Emig verbally was of such a character that he was sure if he went back to Cincinnati that Mr. Emig would consent to changing this contract along the line of the suggested changes. He further stated that he would go to Cincinnati in the evening to do this, and that we would see him a few days prior to this hearing. (Tes. 339-342.)

[fol. 535] The suggested changes were drafted following a conference I had with Mr. Williams. Mr. Williams was present and read over the pencil notes of the changes, and stated that he had no objection to them and believed Mr. Emig would agree to them. He was given several copies of the changes. He said he was going to visit Mr. Gillespie in his office to explain his conversation with Mr. Emig, in which Mr. Emig said that the Big Four would consider making those changes so as not to hurt the Rhondda Coal Co.; they had no desire to do so; if that stood in the way they wouldn't do it. After he visited Mr. Gillespie's office he returned to my office and said Mr. Gillespie didn't agree to any changes of that character, to which Mr. Emig said he would agree. Therefore he said he was going to Cincinnati to get the original understanding straightened out. I proposed to Mr. Williams that the changes be made according to the ones in evidence, in the contract itself, which had already been executed by a number of parties. Mr. Williams stated to me that he didn't think that the Big Four would agree to interline changes without consent of all of the signers. I therefore told him that we would be perfectly willing to go ahead and not hold him up if the Big Four would agree by their attorney, Mr. Gillespie, to these changes. I believe I also told him that if Mr. Gillespie would agree that we would enter our appearance in Chicago before the Commission last Wednesday, and agree to go ahead with the crossings. I want to explain that Mr. Wil-

liams told me that Mr. Emig was the man in the chief engineer's office with whom he dealt, and that he understood that he represented the chief engineer of the Big Four. This conversation took place when Mr. Williams visited Springfield, I think a week ago yesterday, in my office. I therefore told Mr. Williams that we would go to any trouble that would expedite his service, if he would get the consent, which he told me he could get verbally from Mr. Emig. After he returned from Mr. Gillespie's office, he didn't say [fol. 536] anything to me about a trip to Cincinnati in the visit he made to me. He simply said Mr. Gillespie would not listen to any change of any kind whatsoever, even if Mr. Emig did agree to them. I explained to him after that I would not be present in the afternoon and asked him to call on Mr. Stevens, and I am informed that he did so. I also explained I would not be in Springfield the following day, but Mr. Stevens would be, and that Mr. Stevens would represent the company in any stipulation along that line. I wish to say right here we are willing to enter into such a stipulation right now. If this conversation Mr. Williams had with Mr. Emig represents the Big Four's attitude, and what Mr. Gillespie stated in the record at the last hearing, this thing could be settled in 15 minutes. (Tes. 342 346.)

(The cross-petition filed in this case by Mr. Williams was prepared by Mr. Gillespie, at the request of Mr. Williams however.) (Tes. 346.)

Cross-examination:

I said we had a number of track connections with other mines. They are O'Gara #10; Hete Coal Co., and one is being constructed with the Dering Coal Co., and we are right now going to construct one with O'Gara #12. We have had a connection for years with Wasson No. 1, but that has been discontinued. We have no track connection with the Wasson Coal Co. at this time but we did have for several years. If you want to be technical about the tipple, it is a place in which we received coal the same as your railroad. When you get coal from the tracks, I can't see how the fact we didn't serve any of the Wasson Company's tipple track, road tracks, has anything to do with it. You

might prohibit us from going down there because that is the thing you do down there if you can. I don't remember the exact date when the Commission entered that order; some 3 or 4 weeks ago. I know an order was entered because I have a copy of it. I think I have, to the best of my [fol. 537] memory. The commission entered an order after the petition was filed. I don't think all it did was to fix the date of the hearing. I haven't been present at any hearing. I was not present at the first hearing which you say was set in that case for the 11th of this month, and the case was then continued to the present. I testified there was an order issued because I have received 2 copies of what I undrstood to be orders. I don't know that the Big Four is resisting the construction of that track, because we have had no dealings with the Big Four. I testified to that contract with relation to the Dering Coal Co. and the Illinois Central, and the 3 parties, the Dering Coal Co., the Illinois Central and the Southern Illinois Ry. & Power Co., were parties to this petition, and I personally signed and knew we had relations with them, if you are trying to find that out. (Tes. 347-349.)

[fols. 538 & 539] EXHIBIT No. XXIV

Certified copy of file mark showing date on which appeal was filed in the Circuit Court of Saline County, Illinois, from the Illinois Commerce Commission as being July 27, 1923, and also the following named items:

[fol. 540] (2) Be it remembered that on the 25th day of September, A. D. 1923, there was filed in the office of the Clerk of the Circuit Court of Saline County, Illinois, a notice of application for stay order and proof of service on Julius Johnson, Secretary of the Illinois Commerce Commission, which, together with the endorsements thereon, is in the words and figures as follows, to-wit:

[fol. 541] STATE OF ILLINOIS,
County of Saline, ss:

IN THE SALINE CIRCUIT COURT, TO THE SEPTEMBER TERM, 1923

#12819

In the Matter of the Petition of THE ILLINOIS CENTRAL Railroad Company et al. and J. K. Dering Coal Company, Complainant,

v.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Defendants

#12891

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Appellant

v.

J. K. DERING COAL COMPANY and ILLINOIS CENTRAL RAILROAD COMPANY et al., Appellees

Consolidated as Dering Coal Company, Complainant, v. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company under Consolidated Number #12891

The Appeal of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company from the Orders of the Illinois Commerce Commission Entered on the Third Day of May, 1923, and the Eighth Day of May, 1923

NOTICE OF MOTION FOR STAY

To the Illinois Commerce Commission:

[fol. 542] You will take notice that on Tuesday, September 25, 1923, or as soon thereafter as Counsel can be heard, the Appellant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, will present to the Circuit Court of Saline County a motion for a stay order in the above entitled cause staying and suspending said orders of said Commission and offer evidence in support thereof pur

suant to the provisions of Section 71 of the Illinois Commerce Commission Act when and where you may appear and resist the same, if you see fit so to do.

Geo. B. Gillespie, Attorney for the Appellant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

I acknowledge service of the foregoing notice this 21st day of September, A. D. 1923.

Julius Johnson, Secretary of the Illinois Commerce Commission. (Seal.)

[fol. 543] The endorsements on the above and foregoing paper being in the words and figures as follows, to-wit:

* * * "Filed Sept. 25, 1923. Roy E. Holmes, Circuit Clerk." * * *

[fol. 544] In the Saline Circuit Court, to the September Term, 1923

[Titles omitted]

[fol. 545] Motion for Stay, With Proof of Notice—Filed September 25, 1923

And now comes The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Appellant in the above entitled cause, and moves the Court to enter herein an order staying and suspending the orders of the Illinois Commerce Commission entered in said cause on May 3, 1923, and May 8, 1923, and in support of said motion here tenders the testimony of witnesses showing that great or irreparable damage will result to the Petitioner if said orders be not stayed and suspended.

Geo. B. Gillespie, P. J. Kolb, M. J. White, Attorneys for Appellant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

[fol. 546] [File endorsement omitted.]

[fol. 547] Proof of Notice of Motion for Stay Order

Now on this day, being September 25, 1923, and one of the regular term days of this term of Court, the Appellant in said cause, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, came and in open Court made proof of notice that on the 25th day of September, 1923, it would move the Circuit Court of Saline County for an order to stay and suspend the orders of said Commission entered in the above entitled cause on May 3, 1923, and May 8, 1923, and presented here to the Court in accordance with said notice a motion to stay and suspend said orders; and, thereupon, a hearing on said motion was set and fixed by the Court for hearing on October 3, 1923.

[fol. 548] (5) Be it remembered that on the 3rd day of October, A. D. 1923, there was entered by the Court a temporary stay order (by agreement) which is in the words and figures as follows, to-wit:

[fol. 549] In the Saline Circuit Court, to the September Term, 1923

#12819, #12891

[Title omitted]

[fol. 550] Temporary Stay or Suspension Order

Now on this day, being October 3, 1923 and one of the regular term days of the said Court this cause came on for hearing on the motion for stay order or suspension order filed herein. The Appellant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, appeared by Mr. M. J. White, its attorney, and the Appellees appeared by Mr. C. B. Cardy and Geo. Miley, their attorneys, and it was by counsel stipulated in open Court and agreed that a stay or suspension order should be entered in said cause staying and suspending the orders from which the appeal was taken until a final hearing upon the motion to stay or suspend said orders; and the Court being fully advised in the premises and recognizing said stipulation made in open Court, it is accordingly ordered that the orders of the Illinois Commerce Commission entered May 3, and May

8, 1923, in said cause be and they are hereby suspended and stayed until the final hearing on said motion, and said motion is set for hearing on October 13, 1923, at 9:00 o'clock a. m.

[fol. 551] (11) Be it remembered that on the 11th day of January A. D. 1924, there was filed in the office of the Clerk of the Circuit Court of Saline County, Illinois, a stay bond, together with the approval of same, — is in the words and figures as follows, to-wit:

[fol. 552] No. 12819, No. 12891

[Titles omitted]

[fol. 553] The endorsements on the foregoing stay order bond, together with order approving same, are in the words and figures as follows, to-wit:

* * * Bond Approved by the Court this 11th day of January, A. D. 1924. A. E. Somers, Judge.

[fol. 554] Exhibit No. XXV

Order of Illinois Commerce Commission in No. 12819 on the Joint Petition of the Illinois Central Railroad Company, Southern Illinois Railway and Power Company, and J. K. Dering Coal Company for Permission to Extend a Mine Lead Track for the Coal Company at Grade Across the Main Track of the said Railroad Companies and at Grade Across Three Public Highways, All in Raleigh Township, Saline County, Illinois.

[fol. 555] By the Commission:

On November 25, 1922, the Illinois Central Railroad Company, the Southern Illinois Railway & Power Company and the J. K. Dering Coal Company filed a joint petition for permission to extend a mine lead track from Dering Mine No. 2 of the said coal company at grade across the main tracks of the said railroad companies, and across three public highways, all in Raleigh Township, Saline County, Illinois, to a connection with a certain side track of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, as

shown diagrammatically by solid red lines on a certain blueprint dated November 22, 1922, attached to the said petition and made a part thereof.

The petition sets forth that said Mine No. 2 is located about two and one-half miles west of the city of Eldorado immediately north of the main track of the Illinois Central Railroad Company, that the said mine lead track extending southerly therefrom will be about two miles long and is being constructed for the purpose of furnishing an outlet for coal shipments to points south, and that the parties hereto have agreed among themselves as to the manner in which the said railroad crossings shall be constructed as well as the expense thereof, the entire cost of the construction of the said track and such crossing protection as may be necessary to be borne by the J. K. Dering Coal Company. The crossing of the said lead track with the main [fol. 556] track of the Illinois Central Railroad Company is located about the center of Section 24, while the crossing of the said lead track with the main track of the Southern Illinois Railway & Power Company is located about the center of Section 36.

On November 28th the proposed railroad crossings and the proposed highway crossings were viewed by a member of the engineering section of the Commission in company with representatives of each of the interested parties and the report submitted indicates that it is practical to construct and operate the said mine lead track in the manner set forth in the petition; that the train operation on the said lead track will consist of switching movements back and forth between the said mine and the connections with the various railroads involved herein; that probably there will not be more than two or three such movements per day; that train movements on the Illinois Central Railroad consists of the operation of freight trains and local passenger trains, while movements on the main line of the Southern Illinois Railway & Power Company consists of the operation of interurban passenger cars about one cars each way every hour; that the said railway and power company desires some form of interlocking protection at the crossing of its main track with the said mine lead track in order to avoid the necessity of stopping its cars at the crossing, while the Illinois Central Railroad Company proposes, for the time being at least, to stop all of its trains at the

proposed crossing of the said mine lead track with its main track in order to obviate the necessity of installing interlocking protection which would otherwise be necessary; that the physical surroundings at the proposed crossings between Sections 24 and 25 and between Sections 25 and 36 are such as to require special crossing protection, the view at these crossings being badly obstructed; and, that the parties hereto have agreed among themselves as to the manner of crossing in each case, the protection necessary, and the expense involved.

[fol. 557] The petition in this matter is accompanied by a statement dated December 1, 1922, and signed by G. E. Whitlock, Highway Commissioner of Raleigh Township, granting authority to the J. K. Dering Coal Company to extend its mine lead track at grade across three public highways at grade in the said township as follows:

(a) An east-and-west public highway known as the Eldorado-Harrisburg Road on the line between Sections 24 and 25;

(b) an east-and-west public highway on the line between Sections 25 and 36; and,

(c) an east-and-west public highway known as the Wasson-Harrisburg Road on the center line of the north half of Section 36;

all of these crossings being approximately midway east-and-west of the said sections.

Accompanying the petition also is a statement dated December 8, 1922, and signed by the J. K. Dering Coal Company and the Southern Illinois Railway & Power Company setting forth that the latter company consents to the installation of the proposed crossing to be formed by the intersection of their tracks near the southerly end of the proposed mine switch in Section 36, and that the said parties have reached an agreement relative to the installation and expense of such protection as the Commission may deem necessary at the said crossings, a preference being expressed for swinging crossing gate protection, however.

The Commission having given due consideration to the petition in this case, and having caused the said proposed railroad crossings at grade to be viewed as required by law, and after full investigation and with due regard to the

safety of life and property, is of the opinion and finds that the construction of the said mine lead track is necessary in order to facilitate the movement and distribution of coal cars to and from Dering Mine No. 2 and to increase the output thereof; that the installation of the said crossings will not unnecessarily impede or endanger traffic or transportation upon the railroads to be crossed; that the parties [fol. 558] hereto have agreed among themselves as to the construction of the said crossings, the right to cross, the matter of crossing protection, and the expense in connection therewith; that interlocking protection is unnecessary at the crossing of the said mine lead track with the main track of the Illinois Central Railroad Company; that the installation of a swinging crossing gate of an approved type should be installed at the crossing of the mine lead track with the main track of the Southern Illinois Railway and Power Company in order to avoid unnecessary delays to passenger cars on the latter's line of railway; that the highway commissioner of Raleigh Township has given his consent in writing to the extension of the said mine lead track at grade across the three public highways enumerated above; and, that the prayer of the petitioners should be granted.

It is therefore ordered that permission be, and the same is hereby, granted to the Illinois Central Railroad Company to construct and maintain, or cause to be constructed and maintained, across its single main track at grade a mine load track for the purpose of serving the J. K. Dering Coal Company in the operation of its coal mines, at a point about two an one-half miles west of the city of Eldorado near the center of Section 24 in Raleigh Township, Saline County, Illinois, as shown diagrammatically on a certain blueprint dated November 22, 1922, attached to the petition in this case and made a part thereof, and thereafter to operate its engines and cars thereover.

Nothing herein is intended to waive any requirements of Section 12 of an Act entitled "An Act in relation to fencing and operating railroads," approved March 31, 1874, in force July 1, 1874 (Hurd's Revised Statutes 1913, Ch. 114, Secs. 62-76).

It is further ordered that permission be, and the same is hereby, granted to the Illinois Central Railroad Company to construct and maintain, or cause to be constructed and

[fol. 559] maintained, at grade, across the single main track of the Southern Illinois Railway & Power Company, a mine lead track for the purpose of serving the J. K. Dering Coal Company in the operation of its coal mines, at a point about three and one-half miles southwest of Eldorado, near the center of Section 36, Raleigh Township, Saline County, Illinois, as shown diagrammatically on a certain blue print dated November 22, 1922, attached to the petition in this case and made a part thereof, and to operate its trains and cars thereover, the right to cross first having been secured as required by law.

It is further ordered that the Illinois Central Railroad Company and the Southern Illinois Railway & Power Company, be, and the same are hereby, permitted and authorized to install a swinging crossing gate of a type and pattern which shall meet the approval of the Commission, with red banners for day indication and red lights for night indication, at the crossing at grade of the said mine lead track with the main track of the Southern Illinois Railway & Power Company herein authorized to be installed near the center of Section 36, Raleigh Township, Saline County, Illinois, about three and one-half miles southeast of Eldorado, and thereafter to operate and maintain the said device until such time as the Commission may otherwise direct, for the purpose of protecting train movements over the said crossing, the said swinging crossing gate to be set normal for movements on the railroad of the Southern Illinois Railway & Power Company.

It is further ordered that the Southern Illinois Railway & Power Company, within thirty (30) days from the date of service of this order, shall submit to the Commission for approval plans in triplicate showing in a general way the design and manner of installing the said swinging crossing gate herein authorized to be installed at the said crossing.

It is further ordered that the Southern Illinois Railway & Power Company shall notify the Secretary of this Com- [fol. 560] mission, in writing, as soon as the said swinging crossing gate has been installed and is ready for operation so that an inspection may be made by the Commission before same is placed in service. If upon inspection the Commission finds that the said device is substantially constructed and will form adequate protection for the said

crossing, the said railway and power company is hereby permitted and authorized to operate its cars and trains over the said crossing without stopping provided the said swinging crossing gate is properly set for movements on its main track and against trains on the said mine lead track.

It is further ordered that permission be, and the same is hereby, granted to the Illinois Central Railroad Company to construct and maintain, or to cause to be constructed and maintained, at grade a mine lead track for the purpose of serving the J. K. Dering Coal Company across the three public highways in Raleigh Township, Saline County, Illinois, as follows:

(a) an east-and-west public highway known as the Eldorado-Harrisburg Road on the line between Sections 24 and 25;

(b) an east-and-west public highway on the line between Sections 25 and 36;

(c) an east-and-west public highway known as the Wasson-Harrisburg Road on the center line of the north half of Section 36;

all of these crossings being approximately midway east and west of the said sections in which they are located, as shown diagrammatically on the said blueprint attached to the petition in this case, and thereafter to operate its engines and cars thereon.

It is further ordered that the crossings thus formed shall be so constructed that the top of the track rails shall be flush and level with the top surface of the highways at the points of intersection; that each of the said crossings shall be full-planked between rails and as far as the ends of the ties outside thereof for distances of not less than eighteen (18) feet in width measured at right angles to the center, [fol. 561] lines of the said highways; that the top of the planking in the said crossings shall be flush with the top of rails and present a reasonably smooth surface for highway traffic, and shall be maintained thereafter in that condition; that the highway approaches to the said highways within twenty five (25) feet from the center line of track shall be maintained with top surfaces at least eighteen (18) feet in width; that such openings shall be constructed and

maintained underneath the roadbed at each of the said crossings as may be necessary in order to furnish proper drainage; and, that such crossing protection or safety devices shall be installed at the said crossings as is required by law or by order of this Commission.

It is further ordered that the Illinois Central Railroad Company shall make report to the Secretary of the Commission, in writing, the date upon which the said mine lead track is fully constructed across its main track and that of the Southern Illinois Railway and Power Company, and across the three highways in Raleigh Township, Saline County, referred to above, and shall mail such report, or reports to the said Secretary not later than five (5) days after the completion of the work.

The parties hereto having agreed among themselves as to the expense in connection with the installation of the crossings herein involved, no order is entered at this time with respect thereto, but the Commission retains jurisdiction over the subject matter and the parties hereto for the purpose of entering such further orders as in its opinion public interest or convenience may require.

By order of the Commission at Springfield, Illinois, this 14th day of December, 1922.

(Signed) Julius Johnson, Secretary. (Seal.)

[fol. 562] EXHIBIT No. XXVI

Map showing geological survey location of mines on Illinois Central and the Cleveland, Cincinnati, Chicago & St. Louis railways in the State of Illinois, especially in Saline, Franklin, Williamson, and Perry counties, showing, also, location of joint mines on Illinois Central, L. & N., and the Cleveland, Cincinati, Chicago & St. Louis Railway Company at Eldorado, location of three mines on the Illinois Central between Eldorado and Benton, location of about forty or fifty mines on the Illinois Central in Franklin County.

(Here follows map, marked side folio page 562a)

MAPS

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[fol. 563] STATEMENT BE EXHIBIT No. XXVII

Brief of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company filed in the Circuit Court of Saline County, Illinois, in the consolidated cases #12819 and #12891.

(This brief is omitted from the record as immaterial.)

[fol. 564] EXHIBIT No. XXVIII

Fenton statement showing average number of loaders daily and average daily tonnage, by weeks, from March 26, 1921, to March 31, 1922, as follows:

	1921	Average loaders working	Average daily tonnage
Week ending	4/2	168	1871
	4/9	154	1687
	4/16	160	1858
	4/23	171	1835
	4/30	187	1943
Week ending	5/7	183	1988
	5/14	175	1815
	5/21	170	1901
	5/28	175	1834
Week ending	6/4	185	1889
	6/11	185	1877
	6/18	166	1691
	6/25	Idle	
Week ending	7/3	156	1713
	7/10	148	1546
	7/17	138	1616
	7/24	135	1465
	7/31	143	1610
Week ending	8/6	144	1591
	8/13	159	1700
	8/20	159	1557
	8/27	153	1719
Week ending	9/3	135	1582
	9/10	136	1520

Fenton Statement—Continued

	1921	Average loaders working	Average daily tonnage
Week ending	9/17	138	1607
	9/24	152	1652
	9/30	164	1712
Week ending	10/8	175	1688
	10/15	182	1861
	10/22	174	1622
	10/29	187	1880
Week ending	11/5	177	1789
	11/12	189	1907
	11/19	186	1777
	11/26	182	1909
Week ending	12/3	190	1896
	12/10	193	1996
	12/17	182	1745
	12/24	186	1948
	12/31	189	1900

[fol. 565] J. K. Dering Co.

Mine No. 2

	1922	Average loaders working	Average daily tonnage
Week ending	1/7	190	2033
	1/14	190	2164
	1/21	194	2086
	1/28	205	2093
Week ending	2/4	208	2165
	2/11	212	2122
	2/18	210	2143
	2/25	210	2079
Week ending	3/4	215	2147
	3/11	217	2184
	3/18	208	2111
	3/31	196	2130

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[fol. 566] EXHIBIT No. XXIX

Blickensderfer—Map showing location of mines in Saline County, location of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, location of proposed Illinois Central cut off, location of proposed track.

(Here follows map, marked side folio page 566a)

[fol. 567] EXHIBIT No. XXX

Map of witness Stokley showing location of track connection with the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and connection with the Illinois Central and Dering mine, location of same across public highways, and the location of property, drawn to a scale.

(Here follows map, marked side folio page 567a)

[fol. 568] EXHIBIT No. XXXI

Stevenson statement of revenue, showing revenue on coal tonnage from Southern Illinois mines to various territory from January to November, 1923, inclusive. This statement shows coal-hauling rates, how much tonnage is hauled, and to what destinations from the Southern Illinois field.

(Here follows statement, marked side folio page 568a)

Statement showing distribution of coal produced on Illinois Central at Eldorado, Benton, Christopher, and Logan and points to which said coal is transported:

Statement Showing Revenue Coal Tonnage from Certain Producing Points on the I. C. R. R. for Period January 1, 1923, to November 30, 1923, Inclusive

From	Eldorado, Ill.	Benton, Ill. Christopher, Ill., Logan, Ill.	
To	Tonnage	Tonnage	Total
Illinois:			
Except as otherwise shown	156,530	194,736	351,266
Chicago and Chicago District	89,033	791,190	880,223
Peoria	425	2,361	2,766
East St. Louis, Ill., and St. Louis, Mo	1,717	54,600	86,317
Missouri:			
Except as otherwise shown	2,167	49,923	62,090
Kansas City		218	218
St. Joseph, Mo., Atchison and Leavenworth, Kan.	346	1,939	2,235
Iowa:			
Except as otherwise shown	17,552	96,814	114,366
Cedar Rapids	266	4,278	4,544
Fort Dodge	534	1,321	1,855
Mason City	2,497	33,673	36,170
Sioux City	4,086	24,517	28,603

Moline, East Moline and Rock Island, Ill., Bettendorf, Davenport and Iowans, Ia	1,715	31,756	33,472
Council Bluffs, Ia., and Omaha and South Omaha, Neb	5,088	23,660	26,948
Nebraska:			
Except as otherwise shown	1,016	8,561	9,577
Michigan	104,818	1,099	105,917
Wisconsin:			
Except as otherwise shown	7,052	16,079	23,131
Milwaukee	1,705	16,892	18,597
Indiana:			
Except as otherwise shown	1,121	20,416	21,536
Indianapolis			
Fort Wayne			
Gas Belt Points			
South Bend	145,964	203	146,167
Minnesota:			
Except as otherwise shown	9,313	15,638	24,951
Minneapolis, Minnesota Tfr., St. Paul and South St. Paul	4,725	37,953	42,678
South Dakota:			
Except as otherwise shown	1,180	4,793	5,973

Exhibit No. XXXII—Continued

Statement showing distribution of coal produced on Illinois Central at Eldorado, Benton, Christopher, and Logan and points to which said coal is transported—Continued

Statement Showing Revenue Coal Tonnage from Certain Producing Points on the I. C. R. R. for Period January 1, 1923, to November 30, 1923, Inclusive—Continued

From / To	Eldorado, Ill. Tonnage	Benton, Ill., Christopher, Ill., Logan, Ill. Tonnage	Total
Sioux Falls	248	3,724	3,972
North Dakota	791	196	987
Arkansas		634	634
Louisiana		761	761
Tennessee:			
Except as otherwise shown		485	465
Memphis	34	227	261
Mississippi		113	113
Kansas:			
Except Atchison and Ft. Leavenworth		4,102	4,102
States other than the foregoing	103	93	196
Total	558,027	1,443,154	2,001,181

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[fol. 570] EXHIBIT No. XXXIII

Map showing location of lines of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and Illinois Central in Illinois; also showing location of other lines and superior location of Illinois Central as a coal-carrying road from the coal territory in Southern Illinois.

(Here follows map, marked side folio page 570a)

[fol. 571] BEFORE INTERSTATE COMMERCE COMMISSION

DEFENDANT'S SUGGESTED FINDINGS

We sbmit that the Commission under the evidence should make and render the following findings:

(1) The greater weight of the evidence does not establish that the proposed connection is reasonably practicable.

(2) The greater weight of the evidence does not establish that the proposed connection could be put in with safety.

(3) The greater weight of the evidence does not establish that the interstate business that would be received by respondent over the proposed connection would justify the construction and maintenance thereof.

(4) That the complainant is a private business corporation organized under the laws of the State of Illinois, and is authorized by its charter to mine, produce and sell coal and possess the incidental powers reasonably necessary thereto, but has no power under its charter to build, own or operate a railroad, or to own and lease a railroad to be operated by others, or to perform a transportation service for hire.

(5) That the mine of complainant is not an industry on the railway of the respondent, but is an industry on [fol. 571a] the railway of the Illinois Central Railroad Company; and respondent as a common carrier of interstate commerce owes to complainant no duty to transport for it freight in carload lots from its mine on the Illinois Central aside from its duty to accept the same for trans-

portation in interstate commerce when tendered to respondent at an established connection between the rails of respondent's railway and the rails of the Illinois Central Railroad Company, or some other railroad company with which such connection exists or may hereafter exist and transport the same at tariff rates without discrimination.

(6) The proposed railroad track, if connected with the railway of respondent, would be a new connecting railway located in new territory, and if accepted and operated by the Illinois Central, or respondent would as to the railway company accepting and operating the same extend its line of railway to the rails of respondent upon the one hand, or to the rails of the Illinois Central upon the other. No such new railway extension can be built without first obtaining a certificate of convenience and necessity from the Interstate Commerce Commission before undertaking such extension, or the construction of such new line of railroad as required by Paragraphs 18 to 22 of the Interstate Commerce Act.

[fol. 571b] (7) Regarded as the property and railway of the J. K. Dering Coal Company, that company under its charter has no right, power or authority to construct, own or operate the same, or lease the same to a railway company for operation, and Paragraphs 18 to 22 of the Interstate Commerce Commission Act does not authorize the grant of a certificate of convenience and necessity to a corporation without such powers.

(8) The proposed track is not shown by the evidence to be a needed facility either for the use of the Illinois Central Railroad Company or the complainant.

(9) The proposed track, if built as proposed over and across three public highways of the State of Illinois and over and across at grade the Illinois Central Railroad and the railway of the Southern Illinois Railway and Power Company would be a public railroad track and if connected with the railway of either the Illinois Central or the respondent would then become in relation to the railway with which it is connected a part thereof, and under the Constitution of the State of Illinois a public highway free to all persons for the transportation of passengers and freight thereon.

(10) There is no right, power or authority in complainant under its charter to build the proposed track across the public highways and public railways of the State of Illinois, [fol. 571c] but the same if built is and will constitute a purpresture upon the public highways and public railways of the State.

(11) The connection between the railway of the Illinois Central and the railway of respondent at Eldorado is an ample transportation facility for the movement of carload freight from No. 2 mine of the complainant located on the Illinois Central to and upon the railway of respondent and the proposed railway from the mine of complainant to connect with the railway of respondent near the Wasson mine is not needed and would serve no additional purpose of transportation.

(12) The competent evidence does not establish that the Illinois Central Railroad Company has failed to furnish adequate transportation facilities and transport all coal produced by Dering mine No. 2, and tendered for transportation, or that the roadbed, motive power, classification yards and other facilities furnished by that company are inadequate.

(13) It is not established by competent evidence that any failure of the Dering mine No. 2 to produce and sell all the coal it is potentially capable of producing is due to a want of railway facilities furnished by the Illinois Central Railroad Company.

(14) It is not established by competent evidence that mine No. 2 of complainant does not and has not operated as much time during the periods brought in question by the [fol. 571d] evidence as other mines of like character and capacity in Saline County territory located on the railway of respondent.

(15) The evidence shows that the Illinois Central Railroad Company and the Southern Illinois Railway and Power Company by and through the contracts entered into with the J. K. Dering Coal Company are attempting to establish a new line of transportation for the transportation of coal over the proposed track and to invade the territory occupied by respondent and tributary to its railway without showing a public convenience or necessity requir-

ing the establishment of the same and contrary to the public policy of Illinois and of the United States as expressed in the Public Utilities Act of Illinois, and the Interstate Commerce Act of the United States.

(16) The railway in question considered as an existing track was built during the pendency of Numbers 12,819 and 12,891 before the Illinois Commission on appeal, and the track laid after the orders of the Commission had been suspended by the Circuit Court, and in passing on this case the Commission considers said track as having no legal existence.

[fol. 572] BEFORE INTERSTATE COMMERCE COMMISSION

PROPOSED REPORT

[fol. 572½] Complainant, an Illinois corporation, engaged in the mining of coal in Saline County in southern Illinois, by complaint filed January 23, 1924, alleges that the failure and refusal of defendant to construct, maintain, operate, or install a switch connection between its line of railroad and a switch track constructed by complainant and extending from its coal mine to defendant's right of way; and that the failure and refusal of defendant to receive or accept carload shipments of coal for interstate transportation, and to furnish cars for such traffic, is in violation of section 1 of the interstate commerce act. The Commission is asked to require the defendant to construct and maintain a switch connection, to accept interstate shipments of coal tendered it, and to award complainant by way of reparation all damages sustained by it from December 1, 1923, and the effective date of the Commission's order.

In 1917 complainant acquired approximately 3,700 acres of coal land near Eldorado in Saline County, Ill., of which approximately 3,400 acres remain unmined. The amount [fol. 573] of the coal unmined in the acreage is estimated to be between 28 and 30 million tons. The hoisting shaft and mine tipple of complainant are located in about the center of this acreage, and 2½ miles northwest of the defendant's right of way, and immediately north of the right of way of the Eldorado branch of the Illinois Central, hereinafter called the Central. This branch extends

from Duquoin through Benton in Franklin County to Eldorado in Saline County and connects at Eldorado with defendant's Cairo division, running in a northeasterly and southwesterly direction between Danville, Ill., to Cairo, Ill.

Complainant's mine was constructed to produce, and has a potential capacity of 4,000 tons per day and complainant claims it should easily and regularly produce 3,500 tons per day. It is said to be one of the most modern equipped mines in Saline County, but has not reached its full development. The maximum amount produced is between 2,700 and 2,800 tons per day or between 50 and 60 cars. Complainant maintains that the potential capacity could be produced without enlarging the mine capacity or facilities by increasing the labor supply.

The principal reason advanced for the failure of the mine to develop properly is that the Central is unable to furnish sufficient car service. The mine is located on a branch line about 50 miles from the assembling yard, and the Central by reason of curves, grades and other conditions is unable to handle in excess of 25 loads per train from the mine to the assembly yard. Complainant asserts that the mine would soon reach its capacity if it were granted the additional service of the defendant. At the hearing counsel for complainant admitted that this was their sole object in building a switch track and asking for a connection thereto.

Prior to the acquisition of the coal lands by complainant, negotiations were entered into with the defendant and the [fol. 574] Central relative to securing service from both carriers. Complainant already had in operation its No. 3 mine, located on the defendant's line about 1½ miles east of Eldorado. The arrangement proposed was that when the production of the two mines was approximately equal defendant would enter into a reciprocal switching arrangement with the Central, whereby the latter would serve complainant's mine on the line of defendant, and defendant would in turn serve complainant's mine on the Central. The production agreed upon was reached in 1919. Application was then made to have proposed arrangement consummated. Defendant, instead of proceeding with the proposed reciprocal switching arrangement, suggested the building of a private track from the mine to a point on their

line west of Eldorado. This latter proposal was made during the period of Federal control. A survey was made by an engineering corps of the defendant, and the location of the track proposed does not material differ from the one which has been constructed. Defendant refused to proceed further in accordance with their suggestion or to arrange for the consummation of the reciprocal switching arrangement. Following this the complaint in Dering Mines Co. v. Director General, 62 I. C. C. 265, was filed, wherein a joint status for complainant's mines was sought. That complaint was decided adversely to the Dering Company on June 17, 1921. Following this decision further negotiations were conducted. On November 1, 1921, defendant, through its traffic manager, advised complainant by letter as follows:

"If your Company cares to construct and maintain at your own expense a track from your mine up to our line, we will be glad to effect connection with such track, the point of connection of course to be designated by our Operating Department."

Defendant now explains this letter as being a nice way of saying "No." After the receipt of this communication complainant took steps to obtain a satisfactory right of way by options upon the land over which the proposed track was to be laid. These options were closed and the [fol. 575] fee in the lands purchased at a cost of $33,000.

In order to reach the line of defendant over this acquired property, it was necessary to cross several highways, and the rights of way of the Central and the Southern Illinois Railway & Power Company. The latter is an electric line operating between Eldorado and Carrier Mills paralleling the line of the defendant on the north. It will hereinafter be referred to as the Power Company. Contracts were accordingly entered into between the complainant and the Power Company, and also between the complainant and the Central. The contract with the latter provided, inter alia, for the construction of the switch track in question by the Central for the coal company for the sum of $60,000, but it was understood and agreed that if the actual cost of the work and material, plus a certain percentage to cover supervision and cost, and the freight charges on material

would be more or less than that amount, an adjustment would be made.

Construction of the switch track of complainant was started in the latter part of 1923 and finished the first part of this year. It connects with the lead track of the Dering Coal Company about 200 feet north of the crossing of the Central and extends in a southerly direction toward the line of the defendant. It is constructed of what is known as re-lay 85-pound rails on creosoted or treated ties. The track is on from 12 to 18 inches of cinders, gravel, chats or screening ballast, and is in good line and surface. The crossings with the Central and the Power Company are of 90-pound rail. There is one timber trestle which is of standard construction. The track ends at approximately the line of the defendant's right of way. Between the right of way of the Power Company and that of defendant where the connection is sought, complainant has constructed two tracks, one of which they claim can be used as a passing or run-around track, and which will permit of the placing [fol. 576] of empties on one track, while loads are standing upon the other.

After the acquisition of the right of way for the switch track, but before construction thereof, the complainant made two written requests upon defendant for a connection. After the construction of the track had been completed another request dated January 18, 1924, was made for such connection. On February 9 of this year, which was after this complaint had been filed, complainants offered to the defendant for billing and transportation one car of coal which was then standing at the extreme south end of the switch or mine lead track at the right of way of defendant and at which point a connection is sought. It being impossible to accept this traffic at that point, defendant's agent at Eldorado so advised complainant, but stated that it would be accepted at Eldorado. It was not offered there and complainant's witness admitted that it had no record of ever having traffic refused which was offered for transportation by that route.

The cost of the connection is estimated at approximately $2,000 and complainant contends that inasmuch as they have expended a great sum for the construction of the track and will maintain it, the defendant ought to construct and main-

tain at its own expense the switch and all appurtenances thereto on its right of way. It is contended by the complainant that the business which will be handled or received over such connection will be sufficient to justify the installation and maintenance.

A great percentage of the coal produced by complainant at the present time and in the past has moved primarily to Chicago or points beyond. Complainant contends that production in its mine has been curtailed to a great extent because of the fact that there existed no market via the only outlet it had, namely, the Central. There is also a contention and some testimony to the effect that complainant was precluded from markets in Michigan and Indiana be- [fol. 577] cause coal dealers prefer a one-line haul. In order to reach these markets at the present time a haul via two or more lines is necessary.

The complainant states that at the time of the hearing in February, 1924, its mine was getting out more than 50 cars a day, and it would be very natural for them to divide the tonnage approximately equal between the two railroads. The defendant would thus be furnished with substantial tonnage and sufficient revenue to warrant construction of the connection. Complainant introduced in evidence a statement which shows that four competing companies in Saline County, served by defendant, shipped during the year ended March 31, 1922, 52.9 per cent of their total output to destinations other than in Illinois and the Chicago switching district, whereas complainants shipped 27.7 per cent to such other destinations. The contention is that this difference is caused by the wider range of markets which are available by way of the defendant's line.

Defendant's exhibit shows that for the period January to November 1923, both inclusive, the mines in southern Illinois on its line, shipped 50.67 per cent of their total output to points in Illinois, which includes the Chicago switching district, while the Illinois Central mines in the same district shipped 55.66 per cent of their output to the above destinations. To points in Iowa, Michigan and Indiana from defendant's mines there moved 9.26, 3.42 and 11.06 per cent, respectively, of the total output compared with 12.55, 2.13 and 7.37 per cent, respectively, from mines on the Central to points in the same states. The tonnage represented by the above figures moving to Indiana over defend-

ant's line was to a large extent railroad fuel for the New York Central system lines.

Defendant operates between Eldorado and Harrisburg, at which point its assembly yard for that district is located, two tracks which it contends are main tracks, the norther- [fol. 578] most of which complainant contends is used as a passing or run-around track, and which on defendant's exhibit is styled passing track. This northerly track extends from a point just north of Eldorado where it leads off of the other track and ends at Harrisburg within the assembling yard. At the present time there are four switches leading into coal mines connected with this track between Eldorado and Harrisburg. It is with this track that complainant seeks a connection, at a point 3.1 miles east of Harrisburg and 4.5 miles west of Eldorado. During the day time and the early evening this track is practically set aside for the movement of coal and empties, to and from the various mines, the remainder of the time it is operated as a double track. From that track eight mines are served and approximately 275 to 280 loads and the same number of empties are moved over it daily. During January of this year, the largest coal business for a month in the history of the field, 12,483 cars, were loaded, and on both these tracks in one 24-hour period there were operated a total of 47 trains. There have also been as high as 25 switch movements in addition to train movements over this track during a 24-hour period. Defendant contends that additional business could not be handled with these facilities during the peak of business.

The same questions here involved have been considered by the Illinois Commerce Commission. On November 25, 1922, the Central, the Power Company, and the complainant herein, filed with the State Commission a joint petition asking for permission to extend a mine lead track from Dering Mine No. 2 across the mine tracks of the carriers to a connection with the defendant. On December 14, 1922, the State Commission issued an order authorizing the Central to construct such a track. An application was then made by the complainant in this case to the State Commission for an order requiring the defendant to make a switch connection with this proposed track. On petition of the de- [fol. 579] fendant herein the first proceeding was reopened, and consolidated with the latter. After further hearing

before the State Commission an order was entered on May 3, 1923, authorizing the construction of a mine lead track by the complainant, but limiting the use of such track to those ordinarily appurtenant to a lead track to a mine. On May 8, 1923, further orders were issued out of the same proceeding requiring the installation of a switch connection with defendant's track, but limiting its use in accordance with the order of May 3, 1923. From these orders an appeal was taken by defendant to the Circuit Court of Saline County, which court issued a stay order on October 3, 1923 pending final decision. On January 11, 1924, the Court approved and confirmed the orders of the State Commission, and on the same date entered an order staying further proceedings for an appeal to the Supreme Court of the State. An appeal was taken from the decision of the Circuit Court to the Supreme Court of the State, and is now pending before that tribunal.

In asking that we require the defendant to construct a switch connection with its switch track, complainant relies upon paragraph 9 of section 1 of the interstate commerce act. Before our authority under this paragraph can be invoked certain conditions must be observed. The complainant must be the owner of a lateral, branch line of railroad, or a shipper tendering interstate traffic for transportation. The connection must be reasonably practicable, and one that can be put in with safety, and will furnish sufficient business to justify the construction and maintenance of same.

Defendant contends that complainant is not the owner of a lateral branch line railroad because it is not a railroad company and under the laws of Illinois would have no right, power, or authority to construct, own, lease, or operate a branch line railroad connected with a railway engaged as a common carrier in interstate and intrastate commerce. De- [fol. 580] fendant further contends that it is not an application for a connection with a private side track which may be connected with a railroad for the reason that under the law of Illinois a railroad constructed on or across a public right of way, or across a railway engaged in interstate and intrastate commerce is a public highway, and by connection of the rails of such a railway with the rails of a common carrier railway, the railway so connected becomes under the constitution of Illinois a part of the railway public

highway of the railway with which it is so connected, and is free and open to the use of all persons for the transportation of their persons and property.

It is contended that the complainant is so located that it cannot construct a private siding connecting its mine with the railway of defendant, because no track could be constructed without crossing public highways and tracks of other public companies. Further, this mine is not located on the railway of defendant, and any track connecting its mine with the defendant's line would necessarily be a connecting railway for the reason that cars could be moved from the rails of defendant over that track and to and upon the main line of the Central. Defendant further contends that the making of the contracts with the Central and the Power Company conclusively establish that the switch track with which the connection is sought is in fact a new railway, and in effect is intended to be an extension of the railways of both the Central and the Power Company into new territory without a certificate of convenience and necessity having first been obtained. Thus these two carriers would invade territory which by its location defendant contends rightfully belongs to it.

The contract with the Power Company provides that for the privilege of crossing its right of way, complainant would grant to the Power Company the right to operate locomotives or electric engines, trains and cars over said [fol. 581] track for the purpose of transporting passengers and freight from and to all points of origin and destination on said mine lead track, or transporting freight and passengers originating and destined from and to points on the connecting line, and the right to construct on and from said mine lead track and over and upon the right of way of said mine lead track a wye, or other suitable track connection between said mine lead track and the track of the Power Company.

The contract with the Central provided that for the right of permitting such crossing over its right of way, the coal company granted to the Central the right to use the track and operate its engines and cars thereover for the purpose of serving the mine or mines of the Wasson Coal Company, located in the vicinity of the connection of that track, with the tracks of the Big Four, including also mines of any other company, or for any other purpose not inconsistent with the

use of the track by the coal company. There was a further grant which permitted the Central to construct spur tracks leading out of said track. The expense incidental to these was to be assumed by the Central.

Specifically, the defendant opposes the installation of a switch connection or an order from this Commission requiring same on the following grounds: (1) That the building and maintenance of such a track is beyond the scope of the powers granted the complainant by its Illinois charter; (2) that such a track, by reason of the contracts between the complainant and the Central and between complainant and Power Company, will, under the law of Illinois, become a public track and be a part of the public highway of the railways with which it shall be connected; and that an order requiring the connection sought would in legal effect require an extension of the defendant's line to a point not consented to, and would in effect be a taking of property without due process of law and a denial to it of the equal protection of the law; (3) that the making of the proposed [fol. 582] connection would complete a new connecting railway between the Central and defendant without a certificate of public convenience and necessity having first been obtained as required by the Illinois Commerce Law and the interstate commerce act; (4) that the connection would not be reasonably practicable, nor could it be put in with safety, nor would it furnish sufficient business to justify its construction and maintenance. The first two contentions are primarily matters for judicial interpretation and they will not be further considered here.

Under the third contention the defendant argues that the construction of this mine lead track comes within the provisions of paragraphs 18 to 21 of section 1 of the interstate commerce act. In other words that it is an extension of the railway of the Central and that therefore a certificate of public convenience and necessity should first have been obtained. To this we do not agree. We are not here called upon to determine what effect the contracts heretofore referred to may have in the event that operation of the mine track by the Central or the Power Company is undertaken.

Finally defendant contends that the proposed connection would not be reasonably practicable, that it could not be put in with safety and will not furnish sufficient business to

justify the construction and maintenance of same. Defendant maintains that as there now exists a connection with the Central at Eldorado, over which any traffic offered by complainant for movement to a point on or via the defendant's rails would be accepted, the connection here sought is not reasonably practicable. It is asserted that its facilities are being taxed to the utmost during periods of peak business, and that additional business from this mine would lead to congestion and hinder the service and duty it now owes to shippers along its line. It is admitted that if the traffic were offered at Eldorado it would be willing to receive it.

[fol. 583] The track with which the connection is sought has already been described. Complainant's track is not materially different than any of the others, except possibly with respect to the per cent of grade and degree of curvature. At two places, one of which is toward the south end of the track and north of the traction company crossing, the grades reach a maximum at 1.5% which defendant considers excessive. At one place in the lead or switch track there is what is called a 9 degree curve, which defendant claims would make operation thereover unsafe. Defendant's witness, however, testified that on the main line of the Cairo Division a 9 degree curve exists. Defendant shows that if it delivered a train of 35 empty cars over this proposed switch and stopped it 800 feet distant from the Power Company line as required by state statute, that the rear end would still be on defendant's main track and would thus tend to foul it. There is nothing in the record, however, to show why it would be necessary to deliver 35 empty cars over this switch track in one cut. There are now four switch tracks leading to coal mines connected with this track, and defendant claims that an additional connection would materially increase the hazard of operation. To deny the fact that additional switches to any track will increase the hazard of operating over that track would be superfluous, but the addition of the proposed switch does not appear to be so disproportionate as to preclude it on that ground.

In Imperial Wheel Company v. St. L. I. M. & S. Ry., 20 I. C. C. 59, the Commission said: "If the prerequisite statutory conditions exist the connection must be made whether desired by the carrier or not." In Schlicher v. Director

General, 62 I. C. C. 187, the Commission said: "But as construed by us in several cases, the shipper must construct his side track before the carrier is obligated to grant him the switch connection."

The Commission should find that complainant's siding [fol. 584] has been constructed, that application in writing has been made by complainant for a switch connection therewith, and that interstate traffic has been tendered by complainant within the meaning of section 1 of the act; also that there is sufficient business to justify the construction and maintenance of the proposed connection. The Commission should further find that the proposed connection is "reasonably practicable and can be put in with safety." No finding or order with reference to alleged damages sustained should be made, without prejudice to complainant to pursue such remedy as it may have in a court of competent jurisdiction.

[fol. 585] Before Interstate Commerce Commission

Exceptions to Report of Examiner W. P. Bartel

[fol. 586] The defendant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, by its attorneys, excepts to the report proposed by Director W. P. Bartel in the above-entitled cause and particularly specifies the following grounds of exception:

I

The proposed report only contains a recital of the contentions of the respective parties and does not make specific findings upon the material issues presented by the petition and answer, and thereby establish the facts upon which an order is to be based.

II

The proposed report does not pass upon the issues presented by the defendant's answer, supported by testimony and its brief filed herein.

III

The proposed report does not suggest findings of the specific facts and recommend that the order of the Commission be based thereon.

IV

The proposed report does not embrace all of the material facts, and such of those as are mentioned is by way of recital and not by way of specific findings and settlement of issues.

V

The recommended finding that "complainant's siding has been constructed," is contrary to the fact in that it assumes that the complainant is the lawful owner of the track, and that it has the lawful right to own, maintain and operate the same, either by itself or through a common carrier.

[fol. 587]

VI

The recommended finding that the petitioner has tendered interstate traffic within the meaning of Section 1, paragraph 9 of the Interstate Commerce Act is contrary to the fact and the law, because:

VII

The recommended finding that the proposed track connection is "reasonably practicable and can be put in with safety" is contrary to the facts as shown by the evidence and the report is not in accordance with the evidence in that respect for the reason that the uncontroverted facts and evidence before the Examiner show:

VIII

The recommendation of a finding that there is sufficient business to justify the construction and maintenance of the proposed connection is not warranted by any of the facts appearing in the record.

IX

The report proposed would ignore and not pass upon out of four of the vital contentions of the defendant stated in the proposed report, although all of them are material, founded in the issues and indispensable to a correct decision and a lawful order of the Commission: that is to say, the analysis and statement of the issues considered in the proposal of the Examiner are as follows:

X

On page 4 of the petition the petitioner recognized that to sustain his petition he was required to establish a reasonable necessity for the track connection and inserted therein the following averment:

[fol. 588] XI

The defendant excepts to that part of the proposed report which seem to infer that the defendant agreed to give service to the petitioner's mine by a track connection and subsequently refused to carry out its agreement to connect with the track which has been built.

[fol. 589] Before Interstate Commerce Commission

No. 15552

J. K. Dering Coal Company

v.

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company

Order—February 7, 1925

"This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed a report containing its findings

of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"It is ordered, That the above-named defendant be, and it is hereby, notified and required to construct, on or before the 12th day of May, 1925, and maintain and operate thereafter, a switch connection between the siding of complainant, J. K. Dering Coal Company, and the line of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the location and description of which properties are more fully and at large set out in the report of the Commission; the expense of such connection to be borne by said defendant.

"And it is further ordered, That this order shall continue in force until the further order of the Commission.

"By the Commission, Division 5."

(Signed) George B. McGinty, Secretary. (Seal.)

[fol. 590] Before Interstate Commerce Commission

No. 15552

[Title omitted]

Order of the Commission on the Report of Further Argument—March 1, 1926

"It appearing, That on February 7, 1925, division 5 entered its report and order in the above-entitled proceeding; that by order of May 11, 1925, the commission reopened said proceeding for further argument; and that by order of May 27, 1925, the effective date of the said order of February 7, 1925, was postponed until the further order of the commission;

"It further appearing, That further argument having been had and the case submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having on the date hereof, made and filed a report on further argument containing its findings of fact and conclusions thereon, which said report, and report and order of February 7, 1925, are hereby referred to and made a part hereof:

"It is ordered, That the said order of February 7, 1925, be, and it is hereby, made effective on May 4, 1926.

"It is further ordered, That this order shall continue in force until the further order of the commission.

"By the Commission."

(Signed) George B. McGinty, Secretary. (Seal.)

[fol. 591] In United States District Court

Supplemental Statement of Evidence Before Interstate Commerce Commission

[fol. 592] Parts of the record of the Supreme Court of Illinois in appeal from the judgment of the Circuit Court of Saline County affirming the orders of the Illinois Commerce Commission in the cases of J. K. Dering Coal Company et al. v. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, docket #12819, and J. K. Dering Coal Company v. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Docket #12891, consolidated under Docket #12891, admitted in evidence upon the certificate of Chas. W. Vail, clerk of the Supreme Court of the State of Illinois, attested by the seal of said court.

Petition of J. K. Dering Coal Company, Illinois Central Railroad Company, and Southern Illinois Railway and Power Company in No. 12819

(Supreme Court Record, pp. 20-24; pp. of Document Offered in Evidence, 2-6)

Petitioners respectfully show:

"(1) That the Illinois Central Railroad Company and the Southern Illinois Railway and Power Company are railroad corporations duly organized under the laws of the State of Illinois to operate lines of railroad in Saline County, Illinois, and are engaged in the transportation of freight from said County of Saline to points in Illinois;

"(2) That the Petitioner, J. K. Dering Coal Company, is an Illinois corporation engaged in the mining of coal and operates a coal mine near the City of Eldorado in Saline County, Illinois; that said mine is located about 2½ miles West of the City of Eldorado; that the hoisting shaft is located a short distance North of the railroad track of the Petitioner, Illinois Central Railroad Company;

"(3) That it is the desire of the J. K. Dering Coal Company to make track connections with the Southern Illinois Railway and Power Company, and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company or the pur-[fol. 593] pose of having said last named companies serve said mine, and that in order to reach the tracks of said last named companies it is necessary to construct a mine spur-track from said mine of said J. K. Dering Coal Company to the tracks of the Southern Illinois Railway and Power Company and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company;

"(4) Your Petitioners further represent that said proposed track will cross the tracks of the Illinois Central Railroad Company and the Southern Illinois Railway and Power Company, as well as three highways, all of which crossings are to be substantially as set forth on plans attached hereto and made a part of this petition.

"Your Petitioners further represent that they have agreed among themselves as to the manner in which said crossings shall be constructed, and the basis on which the expense of constructing said crossings shall be assumed which agreement will be reduced to writing and filed with this Commission.

"Your Petitioners further represent that the entire cost of construction of said tracks and crossings will be borne by your Petitioners, J. K. Dering Coal Company.

"And your Petitioners respectfully request this Honorable Commission to permit the said mine track to be constructed, operated and maintained in the manner above set forth. Wherefore, your Petitioners ask the Commission to proceed to review the places of the proposed crossings if deemed necessary and after such investigation and hearing

as may be required to provide by an order the place where and the manner in which said crossings shall be made.

"Dated Chicago, Illinois, this 23 day of ——, 1922."

(Signed) J. K. Dering Coal Company, by C. B. Cardy, Its Attorney; Illinois Central Railroad Company, by J. G. Drennan; Southern Illinois Railway and Power Company, by J. Paul Clayton, Vice-President, Petitioners.

[fol. 594] Answer of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company to the Petition or Complaint in #12891

J. K. Dering Coal Company

v.

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company

(Supreme Court Record, pp. 27, 28; pp. of Document in Evidence, 8, 9)

For answer the Defendant (The Cleveland, Cincinnati, Chicago & St. Louis Railway Company) says:

I

"It admits the allegations contained in the first and second paragraphs.

II

"It has no knowledge of the facts alleged in Paragraph (3), and, therefore, neither admits nor denies the same.

III

"Answering Paragraph (4) it admits that the Complainant made application for a switch connection between the rails of Defendant and the contemplated track of Complainant and that said application was refused, but avers that said refusal was based upon good and sufficient reasons; denies that the connection and switch-track contemplated and proposed by Complainant are reasonable and practicable and can be installed and used without materially increasing the hazard of operation of Defendant's railroad; denies that the business of Complainant over said railroad will be sufficient to justify the construction and maintenance

of such switch connection by Defendant; denies that said proposed switch connection with the rails of Defendant is necessary in order to transport to destination coal produced at the mine of Complainant to points of destination on Defendant's line, or enable Complainant to produce and ship the amount of coal necessary to supply its customers; and, further denies that its refusal to put in a switch connection with the proposed track of the Complainant was arbitrary and unlawful.

"Further answering the complaint this Defendant avers that the sole purpose of the proposed connection is to obtain an increased supply of coal cars at Complainant's mine, a matter over which this Commission has no jurisdiction for the reason that the matter of distribution of cars upon the line of this Defendant is wholly within the jurisdiction of the Interstate Commerce Commission.

"Wherefore, having fully answered this Defendant prays that the complaint may be dismissed."

(Signed) The Cleveland, Cincinnati, Chicago & St. [fol. 595] Louis Railway Company, by Geo. B. Gillespie, D. P. Connell.

Petition of Illinois Central Railroad Company, Southern Illinois Railway and Power Company, and J. K. Dering Coal Company, in Docket #12819, to Reopen Cause and Modify Order Entered on the 14th Day of December, 1922

(Supreme Court Record, pp. 408, 409; pp. of Document Offered in Evidence, 11, 12)

"Now comes Petitioners in the above entitled proceeding and request the Commission to reopen said cause and to modify its order heretofore entered on the 14th of December, 1922, and to enter a supplemental order limiting said supplemental order so that said order will be no broader than the original petition heretofore filed herein and grant to the petitioner herein the following:

"1st. Permission of the Commission for the J. K. Dering Coal Company to construct, and maintain a mine track at grade upon and across the tracks of the Petitioner, Illinois Central Railroad Company at a point approximately 2.75

miles West of the City of Eldorado in Section 24, Raleigh Township, Saline County, Illinois, as shown on the blueprint attached to the original petition.

"2nd. Permission to the J. K. Dering Coal Company, Southern Illinois Railway and Power Company to construct and maintain a mine track at grade upon and across the tracks of the Southern Illinois Railway and Power Company at a point approximately 3.5 miles South of Eldorado in Section 36, Raleigh Township, Saline County, Illinois, as shown on the blueprint attached to the original petition in said cause.

"3rd. Permission to the J. K. Dering Coal Company to construct and maintain a mine tracks across the following highways in Raleigh Township, Saline County, Illinois:

"(a) An East and West Public highway known as the Eldorado—Harrisburg Road on the line between Sections 24 and 25;

"(b) An East and West public highway on the line between Sections 25 and 36; and

"(c) An East and West public highway known as the Wasson—Harrisburg Road on the center line of the North half of Section 36.

[fol. 596] "Your Petitioner further represents that the original petition heretofore filed was under Section 58 of the Illinios Commerce Law which requires the permission of this Commission for the construction and maintenance of a crossing at grade over the tracks of the railroad or public highway, and that the said petitioners only desire such approval as is required under Section 58, if any, for the construction and maintenance of a private mine track from the mine of the J. K. Dering Coal Company to the right-of-way of the tracks of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company as shown on the blueprint attached to the original petition filed herein." Signed J. K. Dering Coal Company, Illinois Central Railroad Company, Southern Illinois Railway and Power Company.

Docket Entries of Illinois Commerce Commission Showing Amendment of Petition in #12819

(Supreme Court Record, pp. 410-412; Page of Document Offered in Evidence, 14-16)

"Docket Nos. 12,819 and 12,891 March 28, 1923, set for argument and rule of Commission as to consolidation of #12,819 and #12,891, April 10, 1923, Chicago; April 6, 1923, all parties notified that case will be argued before Commission on April 10, 1923, Chicago; April 10, 1923, argument before Commission case #12,819 consolidated with #12,891. Case taken. Transcript of evidence taken in said hearing as follows: * * *"

Chicago, Illinois, April 10, 11, 1923.—Illinois Central Railroad Company, Southern Illinois Railway and Power Company, J. K. Dering Coal Company #12,819 (Johnson):

"In the matter of the petition to construct a mine spur-track across the tracks of the I. C. R. R., and the Southern Illinois Ry. and Power Co., by J. K. Dering Coal Co., at grade, also across the public highways near Eldorado, Saline County. Amended petition filed by Illinois Central Railroad Co., J. K. Dering Coal Co., and Southern Illinois Railway and Power Co., to reopen case and for modification of order entered December 14, 1922, set for argument and rule of commission as to consolidation of cases #12,891 and #12,819."

[fol. 597] J. K. Dering Coal Company v. C., C., C. & St. L. Ry. Co., No. 12891 (Commission):

"In the matter of petition for switch-track connection with Defendant company at its mine about three miles west of Eldorado, Saline County, petition filed by C., C., C. & St. L. Ry. Co., that Commission dismiss said cause for want of jurisdiction and to set aside order previously entered in case #12,819 and two consolidated cases for hearing."

Answer of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company to Petition of Illinois Central Railroad Company, J. K. Dering Coal Company, and Southern Illinois Railway and Power Company, in Docket #12891 Consolidated, or #12819 Consolidated with #12891, to Reopen and Modify Order of Illinois Commerce Commission Entered December 14, 1922.

(Supreme Court Record, pp. 455-457; pp. of Document Offered in Evidence, 18-20)

"(1) The petition sets forth no grounds or reasons showing authority for the construction of the proposed track from the Dering Mine to the connection with the railway of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, or near the Wasson mine.

"(2) It denies that the construction of such track is within the authority or jurisdiction of the Commission under the provisions of the Illinois Commerce Act granting power to make track connections to industries.

"(3) Denies that the Dering Coal Company is a shipper or contemplated shipper or receiver of freight on the railway of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, but says that it is a shipper and proposed shipper or receiver of freight on the railway of the Illinois Central Railroad.

"(4) It denies that said track is intended as an industrial track, or that it would be a private industrial track when constructed and used as the petitioner intends to construct and use it, and avers that it would be a track in extension of the railway of the Illinois Central Railroad into new territory and an extension of the railway of the Southern Illinois Railway and Power Company into new territory.

[fol. 598] "(5) It denies that there is power or jurisdiction in this Commission to entertain the petition to build such an extension as the petition and evidence show is proposed in the construction and use of the proposed track.

"(6) It denies that the said track can be built and used as proposed without a certificate of convenience and necessity granted to the Illinois Central Railroad Company and to the Southern Illinois Railway and Power Company, and that this Commission has jurisdiction to grant such certificate, but says that if it has such jurisdiction the petitioner

has disclaimed any desire therefor and under this state of facts this Commission can neither authorize construction of said track nor grant a certificate of convenience and necessity.

"(7) It shows that said track when constructed is leased to the Illinois Central Railroad and the Southern Illinois Railway and Power Company to be operated by them in extension of their railways and it denies the right, power or authority of the Dering Coal Company to construct and lease a railway or railway tracks to be operated under a lease for general railway purposes.

"(8) It denies that the Dering Coal Company is entitled indirectly to obtain the use of facilities of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company by building a railroad from its mine to the rails of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company so as to create a fiction that it is an industrial track on both the Cleveland, Cincinnati, Chicago & St. Louis Railway and the line of the Illinois Central Railroad, and shows the Commission that whether an industry is or is not an industry on the railway of the particular railway company cannot be determined by the industry, but must be determined by the physical location of the industry with respect to the railway as constructed, owned and operated by the railway company.

"(9) The respondent claims the same benefit of this answer as if it had moved to dismiss the cause for want of jurisdiction or demurred to the petition herein, and reserves by this answer all the questions of law for consideration by the commission not waiving any of them by filing hereof." Signed The Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

[fol. 599] Filing and copy of petition for rehearing (Supreme Court record pp. 505-515; pp. of document offered in evidence, 22-32), as follows:

Petition for Rehearing Filed by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and for Dismissal of Orders and Case by Commission—Filed May 29, 1923

"Your petitioner, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, as to the orders of said Com-

is made without a Certificate of Convenience and Necessity mission in said cause purporting to have been entered on the 3rd day of May, 1923, and on the 8th day of May, 1923, respectively, prays your Honorable Commission to set aside said orders and grant to your Petitioner a rehearing of said cause; that upon a rehearing hereof an order be entered herein dismissing said petitions: And your Petitioner shows unto your Honorable Commissioners as grounds and reasons therefor the following:

"(1) The original petition filed in No. 12819, and the evidence contained in the record bearing thereon show that the object and purpose of said track is to invade new territory and connect a mine located on the Illinois Central by an independent railway with the track of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company for the transportation of coal to be delivered to the latter; that if said track shall be treated as a part of the railway of the Illinois Central then it is an extension of the Illinois Central Railway into territory of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and such extension from this Commission and without a certificate of Convenience and Necessity from the Interstate Commerce Commission, and no such extension can be made without Certificates of Convenience and Necessity; that if said track should be operated independently by the Dering Coal Company then the Dering Coal Company would be operating a railroad without charter power or authority so to do and it cannot exercise the rights of a transportation company; that if the Dering Coal Company, as it would probably do if this track should be built, should demand the Cleveland, Cincinnati, Chicago & St. Louis Railway Company to absorb the charge of transportation from its mine to the connection that would in effect be requiring the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, contrary to its purposes and desires to extend its railroad to a connection with the Illinois Central contrary to law; that the record shows that at a shorter distance from the Dering mine than that between said mine and the proposed point [fol. 600] of connection the Illinois Central has a track connection with the Cleveland, Cincinnati, Chicago & St. Louis Railway Company's track at Eldorado and full power and jurisdiction is vested in this Commission to so adjust rates

and routes as to give reasonable rates of transportation to said connection and over the rails of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company to any point on its lines. Therefore, the construction of such track would result in an unreasonable and unnecessary increased capitalization for the traffic to bear contrary to the principle of state and interstate regulation of public utilities.

"Your Petitioner therefore shows that the construction of said track is not required by the public convenience and necessity and is not such a track as may be connected with the railway of your Petitioner under the provisions of Section 45 of the Public Utilities Act.

"(2) Your Petitioner shows that the order of the Commission granting the right to construct said track across the railways of the Illinois Central and the Southern Illinois Railway and Power Company so as to connect the Dering mine and connect said track with the main lines of the Illinois Central and the Southern Illinois Railway and Power Company, is in legal effect an extension of the railways of the Southern Illinois Railway and Power Company to the main track of the Illinois Central Railroad and an extension of the Illinois Central Railroad to the connection with the Southern Illinois Railway and Power Company and the railway of your Petitioner, and is, therefore, such an extension as cannot be made under the laws of the State of Illinois, and under the laws of the United States of America without a Certificate of Convenience and necessity from either the Illinois Commerce Commission or the Interstate Commerce Commission, or both, and that your Honorable Commission has no power, jurisdiction or authority to grant such right or authority to build said track without also granting a Certificate of Convenience and Necessity for the construction thereof.

"(3) Your petitioner further shows that under the provisions of the Interstate Commerce Act no railway company engaged in interstate commerce can extend its railway into new territory without a certificate of convenience and necessity granted by the Interstate Commerce Commission; that the Illinois Central Railroad is a railroad engaged in interstate commerce, and that the construction of said track will connect the same with the main track of

the Illinois Central Railroad and would in legal effect extend its railway to the said connection and afford a physical connection with the railway of the Southern Illinois Railway and Power Co. through and over which commerce could be transported through the systems and interchange between the Southern Illinois Railway and Power Company and the Illinois Central Railroad Company be affected; that [fol. 601] said connection in effect constitutes the said track a part of the railways of the said Southern Illinois Railway and Power Company, and the Illinois Central Railroad Company, subject to operation under the directions of your Honorable Commission, and if permitted your Honorable Commission would have no power to prohibit the transportation of cars thereover and the limitations which are contained in the orders of the Commission limiting the use of said tracks after their connection do not change the character of said tracks or render them any loose parts of the railways of the Southern Illinois Railway and Power Company and the Illinois Central Railroad Company.

"(4) You petitioner further shows that the order of the Commission permitting the connection of said tracks is in effect a grant of authority to the Illinois Central Railroad Company to invade the territory of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company for the purpose of coal transportation from and off the lines of The Cleveland, Cincinnati, Chicago & St. Louis Railway to and over the lines of the Illinois Central Railroad contrary to the public policy of the State of Illinois, and of the United States of America established and fixed by the Illinois State Commerce Commission Act and the Interstate Commerce Act, and in effect authorizes without a certificate of convenience and necessity the construction of extensions of railways into new territory and the increase of capitalization which the traffic must bear and the consumer must pay without any public convenience or necessity requiring the same.

"(5) Your petitioner further shows unto your Honors that this Honorable Commission has by a certain order in No. 12456, provided joint rates and through routes over the Illinois Central Railroad from the Dering mine to the connections of the Illinois Central with the railway of your

petitioner at Eldorado, thence over the rails of your petitioner to Parker City, thence over the Illinois Central to a point on the Illinois Central to Roseview, a distance of seventy-two (72) miles, $1.05 for the transportation of coal; that said through route and joint rate is illustrative of through routes and joint rates that may under the power of this Commission be made for the transportation of coal from the Dering mine to any point on the railway of your petitioner and is such an adjustment of transportation facilities as is contemplated by the laws of the State of Illinois, and of the United States instead of the construction of additional transportation facilities where not required to effect the physical interchange between railways and the transportation of freights over through routes under joint rates; that the proceedings in said No. 12456, J. K. Dering Coal Company v. Illinois Central R. R. Co., and the Cleveland, Cincinnati, Chicago & St. Louis Railway are material to a consideration hereof, and your petitioner prays leave to introduce the petition and orders of the Commission in said cause into the record of this cause and that the case may be made a part thereof.

[fol. 602] "(6) Your petitioner further shows that the object and purpose of the complainant, the Dering Coal Company, by the construction of the proposed track is to have its mine, which is in fact not located on the railway of your Petitioner, treated as a mine located jointly on the railway of the Illinois Central Railroad Company and your petitioner for the purpose of obtaining a distribution of cars as if to a mine located jointly on two railways, contrary to the decision of the Interstate Commerce Commission; that said mine is not so jointly located and contrary to the protest of the complainant, the Dering Coal Company, that its object and purpose is not to obtain any other or different distribution of cars than would be due to it as a mine located solely on the Illinois Central.

"Your petitioner shows that the attitude of the Dering Coal Company in this regard is one of disclaiming what it really seeks.

"(7) Your petitioner further shows that the only grounds or reasons urged by the Dering Coal Company as the basis of the orders of the Commission is that the physical

facilities for the transportation of coal from its mine and the train service of the Illinois Central in transporting coal from its mine to the classification yards of the Illinois Central at Duquoin are inadequate and that it cannot reach the points on the railway of your petitioner at the same rate as other mines located on the railway of your petitioner can reach such mines.

"Your petitioner shows that the remedy of the complainant, the Dering Coal Company, if it has a remedy, lies in obtaining from this Honorable Commission an order against the Illinois Central Railroad Company requiring it to furnish adequate facilities and train service and establishing just and reasonable through rates and joint routes for the transportation of coal from its mine through the connection at Eldorado to points upon the railway of your petitioner, and not by the construction of an unnecessary track thereby increasing capitalization and imposing an unnecessary burden upon the public and creating an artificial condition as to the location of the mine of the complainant, Dering Coal Company, on the railway of your petitioner when in fact it is not so located.

"(8) Your Petitioner further shows that the mine of the Complainant, Dering Coal Company, is not so located and related to the Railway of your Petitioner as that it can construct a track and claim the right to a track connection between the tracks of your Petitioner and the tracks so constructed under the provisions of Section 45 of the Public Utilities Act, and there is no evidence in the record upon which this Commission can fairly base an order for such track connection.

[fol. 603] "(9) Your petitioner further shows that the findings of the Commission are inadequate upon which to base either of the orders entered herein.

"(10) Your Petitioner further shows that this Commission has not discharged its duty under the law to render findings concerning the subject-matter and facts inquired into and enter an order based thereon; that no findings have been made upon many of the issues submitted to your Honors by the pleadings herein material to a settlement of the rights of the parties to said proceeding particularly

and by the specification not intending to waive other failures to make findings it says: that there is no finding as to whether there is any public convenience or necessity requiring the construction of said track or the connection thereof with the railway of your Petitioner, nor is there any finding as to whether said track would or would not, if constructed, be a part of the railways of either the Southern Illinois Railway and Power Company or the Illinois Central Railroad Company, or both, nor as to whether said track when constructed would be a public track to which the right of use could not be denied to anyone applying for the use thereof or for connection therewith.

"(11) Your Petitioner further shows that your Honorable Commission was and is without jurisdiction, power or authority under the laws of the State of Illinois, and of the United States of America to enter the said orders or either of them or to enforce the same.

"(12) Your Petitioner further shows that said contract when constructed if operated by either the Southern Illinois Railway and Power Company or the Illinois Central Railroad Company would in effect constitute an extension of the railway of such Company, and if operated by both would constitute an extension of the railways of both of said companies; that if your Petitioner should be required to operate said track by a subsequent order of this Commission compliance with such requirement would in effect constitute an extension of the railway of your Petitioner and that no such extension can be effected without the previous grant of a Certificate of Convenience and Necessity therefor; that if said track should be operated by the Dering Coal Company it would in effect exercise the rights, powers and privileges of a railway corporation not being so incorporated and in excess of its charter power; that to grant the construction of said railway and a connection therewith without prescribing the manner in which the case is to be operated this Honorable Commission is by the said orders in effect authorizing a capitalization and expenditure which must be borne by the traffic from which no benefit can be derived without violating the laws of the State of Illinois and of the United States; that the orders of this Honorable

Commission heretofore entered are, therefore, impotent, with jurisdiction and void and should not be permitted to remain upon the records of this Honorable Commission.

[fol. 604] "(13) Your Petitioner further shows unto your Honorable Commission that the record herein shows that the Dering Coal Company has entered into contracts for the operation of said connection track jointly by the Illinois Central Railroad Company and the Southern Illinois Railway and Power Company; that the point was made in the answers and in the proofs and argument in the briefs filed herein that said contracts show objects and purposes of said track, manner in which the same is to be operated and that the same show that the whole scheme is an effort on the part of the Illinois Central Railroad Company to invade the territory of your Petitioner and haul coal from the mines located on the railway of your Petitioner over said track to the railway of the Illinois Central Railroad Company; that the order of the said Commission does not make findings in relation to the force and effect of said tracks, nor does it otherwise restrict the use of said track than by holding that it can only be used to transport cars to and from the connection with the railway of your Petitioner to and from the mine of the Complainant, Dering Coal Company, until the further order of this Commission; but, your Petitioner shows that in such limitation and without findings in relation to the validity and effect of said contracts your Honorable Commission has overlooked and failed to construe and apply the decisions of the Supreme Court of Illinois holding that when a track is physically connected with the main track of a railway company engaged in intrastate and interstate commerce that it becomes a public track and a part of the railway of the railway company with which the case is connected subject to use by the public and does not in sufficiently expressive terms limit the use of said track nor determine the extent to which it may hereafter be used under the orders of this Commission.

"(14) Your Petitioner further shows that the Dering Coal Company now claims that for the transportation of coal from its mine to the connection between the railway of your Petitioner and the proposed track it will ask this

Honorable Commission to make a transportation allowance to it for such transportation; that such claim is contrary to and in conflict with the principles that the railway of your Petitioner cannot be extended by the order of this Commission without a Certificate of Convenience and Necessity, and this Petitioner cannot be required to transport freights or pay the expense of transporting freights from points remote from its line over the main track of a carrier upon which said freights are located for transportation on the railway of your Petitioner, and that the allowance to the Dering Coal Company of such a transportation charge would be an unjust discrimination in its favor because of its ownership of a track which is not under the law authorized to own and from which it has no right to derive an income for transportation.

"Your Petitioner shows that for each and every of the causes aforesaid the orders of your Honorable Commission are contrary to the law, without the power and jurisdiction of this Commission and should be set aside, a rehearing awarded and that an order should be entered dismissing the petitions herein."

(Signed) The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Petitioner, by Geo. B. Gillespie, Its Attorney.

[fol. 605] Filing of Amendment to Petition for Rehearing and the Petition. (Supreme Court Record, pp. 516-519; pp. of document offered in evidence, 34-37):

Amendment to Petition for Rehearing Filed by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company—Filed June 6, 1923

"Now come the petitioner, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, defendant, and with leave of the Commission amends its petition for a rehearing in the following particulars:

"Following paragraph four and as a part thereof add the following:

"Your petitioner shows that if the order of the Commission is not in fact a grant of authority to the Illinois Central Railroad Company and the Southern Illinois Railway

and Power Company to extend their rails then the Commission is without power to grant the application of the J. K. Dering Coal Company to cross at grade the tracks of the Illinois Central Railroad Company and the Southern Illinois Railway and Power Company, under the provisions of Section 50 of the Illinois Commerce Commission Act, which only grants such authority to railroad corporations and grants no such authority to any coal companies or any other than railroad corporations.

"Section 10, of the Illinois Commerce Commission Act, strictly limits the rights conferred upon railroad companies to those operated for public use in the transportation of persons or property for compensation, which can in no sense include Coal Corporations.

"Amends Section 5 of the petition by adding thereto the following:

"Your petitioner further shows that in the establishment of the joint rate and through route aforesaid, Docket No. 12456, both the Dering Coal Company and your Honorable Commission recognize and admit the existence of adequate exchange facilities within the power of the Commission, which by the present application the J. K. Dering Coal Company has assumed this Commission will not exercise; therefore there is at Eldorado all the facility necessary for the J. K. Dering Coal Company to avail itself of the facilities of your petitioner and reach all points local to its lines without the construction of the proposed track.

[fol. 606] "Amends paragraph seven of said petition by striking therefrom the first sub-paragraphs thereof and insert in lieu thereof the following:

"'Your petitioner further shows that the records in these proceedings do not constitute a sufficient basis for the orders of the Commission; that in support of its application for an additional connection between its mine and the tracks of your petitioner, the Dering Coal Company urged but two grounds. First, that the Illinois Central upon whose rails its mine is located and upon which it must depend for its empty car supply, has failed to equip itself with sufficient and adequate facilities for hauling the traffic of complainant with reasonable dispatch, and such failure has at various times in the past resulted in delay to the movement of empty cars to the mine and the movement of

loaded cars from the mine to the classification yard at Du Quoin, and second, that joint through rates are not now published from complainant's mine on the Illinois Central to destinations on the line of your petitioner and the combination rates which are applicable from said mine to said destinations are higher than the rates published by your petitioner from mines which it serves in the same vicinity to the same destinations.'

"In the fifth line of the second paragraph of paragraph seven, after the words 'train service,' insert the following:

" 'or if necessity is shown therefor the establishment of just and reasonable through routes and joint rates for the transportation of coal from its mine through the connection at Eldorado to local points upon the railway of your petitioner.'

"It is therefore inconsistent with the Illinois Commerce Commission Act and the policy of the State established thereby to grant the order of the Commission to supply facility which already exists."

(Signed) The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Petitioner, by Geo. B. Gillespie, Its Attorney.

[fou. 607] Record of denial of petition for rehearing. (Supreme Court Record, pp. 522-524; pp. of document offered in evidence, pp. 39-41):

June 13, 1923, at a conference of the Commission the Petition for Rehearing filed by The Cleveland, Cincinnati, Chicago & St. Louis Railway Company was denied by the Commission.

June 18, 1923, Geo. B. Gillespie, Attorney for C., C., C. & St. L. Ry. Co., so advised by letter of Secretary.

June 29, 1923, notice of appeal filed by C., C., C. & St. L. Ry. Co. from orders entered by the Commission May 3, 1923, and May 8, 1923, to Saline County Circuit Court.

Notices of Appeal

Title to Causes #12819 and #12891 Consolidated as Dering Coal Company, Complainant, v. The Cleveland, Cin-

cinnati, Chicago & St. Louis Railway Company, Consolidated #12891

"To Julius Johnson, Secretary of Illinois Commerce Commission:

"You will take notice that The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Defendant in the [fol. 608] above consolidated cause, does hereby appeal said cause from the orders of the Illinois Commerce Commission entered therein on the 3rd day of May 1923, and on the 8th day of May, 1923, in which causes a petition for rehearing was denied by said Illinois Commerce Commission on June 13, 1923; that the subject-matter of said hearing is situated in the County of Saline and State of Illinois, and therefore, said appeal is hereby taken by the Appellant to the Circuit Court of Saline County. You will, therefore, prepare and certify the complete record in said cause pursuant to the statute in such case made and provided and in accordance with the rules of said Illinois Commerce Commission.

"Dated at Springfield, Illinois, this 29th day of June, A. D. 1923."

(Signed The Cleveland, Cincinnati, Chicago & St. Louis Railway Company (by Attorney).

Notice of Motion for Stay Order and Acknowledgment of Same by the Secretary of the Illinois Commerce Commission

(Supreme Court Record, pp. 648-651; pp. of Document Offered in Evidence, 43-46)

"Be it remembered that on the 25th day of September, 1923, there was filed in the office of the Clerk of the Circuit Court of Saline County, Illinois, a notice addressed to the Illinois Commerce Commission notifying the Illinois Commerce Commission that on September 25, 1923, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company would present a motion for a stay order before the Circuit Court of Saline County, together with proof of service in the words following:

"To the Illinois Commerce Commission:

"You will take notice that on Tuesday, September 25, 1923 or as soon thereafter as counsel can be heard, the Appellant,

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, will present to the Circuit Court of Saline County a motion for a stay order in the above entitled cause staying and suspending the said order of said Commission and offer in evidence in support thereof pursuant to the provisions of Section 71 of the Illinois Commerce Commission Act when and where you may appear and resist the same if you see fit so to do."

(Signed) Geo. B. Gillespie, Attorney for Appellant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

"Acknowledge service of the foregoing notice this 21st day of December, 1923."

On the back of this notice appears the following endorse-[fol. 609] ment: "Filed September 25, 1923, Roy E. Holmes, Circuit Clerk."

Bill of exceptions filed in the Circuit Court of Saline County 9th day of February, 1924, with orders of the court, which, together with endorsements and files, are in the words and figures following: (Supreme Court record, pp. 633; pp. of document offered in evidence, 50.)

Order of the Circuit Court of Saline County suspending the force of orders of May 3, 1923, and May 8, 1923 (Supreme Court record, pp. 642; pp. of document offered in evidence, 52), Illinois Commerce Commission, on Docket Nos. 12819 and 12891, in the words following:

"It is ordered and adjudged that the said orders of the Illinois Commerce Commission May 3, 1923 and May 8, 1923, be and the same are hereby stayed and suspended pending this appeal in this Court and to the April Term, 1924, of the Supreme Court of Illinois, subject to any and all such orders as may be entered therein by the Supreme Court."

Order of Illinois Commerce Commission #12819 and #12891, consolidated May 3, 1923 (pp. of document offered in evidence, 76-83.) (Reference is made to Exhibit 12 in previous part of record, which includes the two orders of May 3 and May 8, 1923, before the Interstate Commerce Commission.)

Order of Illinois Commerce Commission #12819 and and #12891, Consolidated May 8, 1923 (pp. of document offered in evidence, 85-91.) (Reference is made to Exhibit 12 in previous part of Record, which includes the two orders of May 3 and May 8, 1923, before the Interstate Commerce Commission.)

[fol. 610] Assignment of errors in the Supreme Court of Illinois (pp. of document offered in evidence, 93-85):

"Assignment of Errors

"And now comes the Appellant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company by its attorney and says upon the face of the record in the above entitled cause there is manifest error and for specification of errors appearing thereon assigns the following:

"(1) The Circuit Court of Saline County erred in affirming and approving the orders of the Illinois Commerce Commission and in not reversing and setting the same aside upon the ground and for the reasons specified in the petition for a rehearing which is a part of the record in said cause, and in not sustaining every of the grounds assigned in the said petition for a rehearing.

"(2) The Circuit Court of Saline County erred in not reversing the said cause upon the ground and for the reasons that the Illinois Commerce Commission had no jurisdiction, power or authority under the law to enter the character of orders that were entered in said cause.

"(3) The said Court erred in not reversing the said cause upon the ground and for the reasons that the Illinois Commerce Commission made no findings upon which the orders entered in said cause could be based.

"(4) Said Court erred in not reversing said cause upon the ground and for the reason that the said orders and each of them attempted to authorize the extension of railways and the establishment of new and additional lines of railway without any evidence upon which to grant and without granting a certificate of convenience and necessity, and without a certificate of convenience and necessity having been granted by the Interstate Commerce Commission.

"5. Said Court erred in not reversing the said cause upon the ground and for the reason that the orders grant to the Dering Coal Company, a business corporation organized under the general laws of Illinois authority to construct a railway over public highways of the State, and to operate said railway either directly or through an agent or lessee without statutory or charter power to do either.

[fol. 611] "(6) Said Court erred in not reversing the orders of the said Commission because they are based upon hearings in which the Commission neglected and refused to pass upon the issues presented by the pleadings and by motions and objections of counsel for Appellant.

"(7) Said Court erred in not reversing said cause upon the ground and for the reason that the evidence in said cause does not fairly tend to prove a necessity for the construction of the alleged mine lead track.

"(8) Said Court erred in not ruling and holding that the orders of the Illinois Commerce Commission are contrary to the Fourteenth Amendment to the Constitution of the United States, that they are an attempt to authorize the taking and are the taking of the property of Appellant without due process of law and a denial to it of the equal protection of the law by the representative of the State, the Illinois Commerce Commission.

"Wherefore, for the causes assigned and for other good and sufficient causes appearing on the face of said record the Appellant prays that the judgment and order of the Circuit Court of Saline County be affirmed."

Order and judgment of the Supreme Court of Illinois, entered February 7, 1925, reversing the judgment of the Circuit Court of Saline County and the order of the Illinois Commerce Commission in the words following (*pp.* of document offered in evidence, 96):

"Therefore, it is considered and ordered by the Court that for that error and others in the record and proceedings aforesaid the judgment of the Circuit Court of Saline County in this behalf rendered be reversed and annulled set aside and wholly for nothing esteemed, and the orders of the Illinois Commerce Commission set aside."

[fol. 612] In United States District Court

In Equity. No. 5733

[Title omitted]

Order re Transcript of Record—Filed July 1, 1926

[fol. 613] On the agreement of the parties in open court, this July first, 1926, the within and foregoing narrative and abridgment is approved; and it is ordered that the same shall be made a part of the Record and, in its original form, shall be transmitted to the Clerk of the Supreme Court in lieu of a copy thereof.

Evan A. Evans, Circuit Judge. James H. Wilkerson, Adam C. Cliffe, District Judges.

[fol. 614] In United States District Court

[Title omitted]

Petition for Appeal and Order Allowing Same—Filed June 10, 1926

The above named Plaintiff conceiving itself aggrieved by the decree made and entered on the 24th day of April, 1926, in the above entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the Assignment of Errors which is filed herewith and pray that this appeal may be [fol. 615] allowed, and that a transcript of the record, proceedings and papers upon which said order was made duly authenticated may be sent to the Supreme Court of the United States.

Geo. B. Gillespie, Attorney for Plaintiff. Of Counsel: C. P. Stewart, D. P. Connell, Geo. B. Gillespie.

Dated this 10th day of June, A. D. 1926.

The foregoing claim and petition for appeal is allowed. Dated this 10th day of June, A. D. 1926.

Evan A. Evans, Circuit Judge. James H. Wilkerson, District Judge. Adam C. Cliffe, District Judge.

[fol. 616] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed June 10, 1926

And now, on this 10 day of June, A. D. 1926, came the Plaintiff by its solicitors, whose names are subscribed hereto, and says that the decree in said cause is erroneous and against the just rights of the said Plaintiff for the following reasons:

(1) Because the said decree finds the issues against the Plaintiff and dismisses the Plaintiff's bill.

[fol. 617] (2) Because said decree did not find the issues and each of them in favor of the Plaintiff and enter a decree in said cause setting aside, holding for naught and declaring void the orders of the Interstate Commerce Commission in cause, Docket No. 15,552, entered on February 7, 1925, and all orders entered since that date in said cause, including the order entered on the 1st day of March, A. D. 1926, making effective, on May 4, 1926, the order of February 7, 1925.

(3) Because said decree in effect affirmed the orders of the Interstate Commerce Commission of February 7, 1925, and March 1, 1926, making said order effective on May 4, 1926.

(4) Because said decree did not find and hold that the track described in the complaint of the J. K. Dering Coal Company to the Interstate Commerce Commission in Docket No. 15,552, is not a spur-track within the meaning of Paragraph 9, or (G), Section 1, or an Act to Regulate Commerce, approved February 4, 1887, as amended, and that the Complainant was not entitled to relief under the provisions of said paragraph, and that the orders of the Interstate Commerce Commission are for that reason void.

(5) Because said decree did not find that the Complainant, the J. K. Dering Coal Company, at the time of filing its complaint, was not as to its mine No. 2 as described in the complaint filed with the Interstate Commerce Commission in Docket No. 15,552, a shipper in interstate commerce

on the railway of the Plaintiff tendering freight for shipment on said railway, and for that reason the orders of the Interstate Commerce Commission here involved are void.

[fol. 618] (6) Because said decree did not find that the evidence in said cause as introduced before and heard by the Interstate Commerce Commission in Docket No. 15,552, failed to establish the material allegations of the complaint as required by Paragraph 9, or (G), Section 1, of an Act to Regulate Commerce, approved February 4, 1887, and acts amendatory and supplemental thereof, to entitle the Complainant, the J. K. Dering Coal Company, to the relief prayed by said petition, and for that reason the orders of the Interstate Commerce Commission here involved are void.

(7) Because said decree did not find that the evidence before the Interstate Commerce Commission failed to show that the J. K. Dering Coal Company was a shipper tendering interstate traffic for transportation upon the railway of the Plaintiff on a private side-track which had been lawfully constructed to connect with the railway of the Plaintiff; that such connection was reasonably practicable and could be put in with safety, would furnish sufficient business to justify the construction and maintenance of the same; and that for said reason the orders of the Interstate Commerce Commission here involved are void.

(8) Because said decree did not find that the proposed track described in the complaint filed by the J. K. Dering Coal Company and by the testimony of witnesses in case, Docket No. 15,552, lately pending before the Interstate Commerce Commission, was not a lateral or branch line of railroad, or a private side-track within the meaning of Paragraph 9, or (G), Section 1, of an Act to Regulate Commerce, approved February 4, 1887, as amended and supplemented, and for that reason the orders of the Interstate Commerce Commission here involved are void.

[fol. 619] (9) Because said decree in effect erroneously finds and holds that the proposed track described in the complaint and by the evidence in case Docket No. 15,552, lately pending before the Interstate Commerce Commission, is a private side-track of a shipper tendering inter-

state traffic for transportation within the meaning of Paragraph 9, or (G), Section 1, of an Act to Regulate Commerce, approved February 4, 1887, and acts amendatory and supplementary thereof contrary to both the law and the undisputed testimony in said cause.

(10) Because said decree did not find from the evidence (record):

(1) That the purposes and objects of the construction of the track described by the complaint and the evidence in case, Docket No. 15,552, lately pending before the Interstate Commerce Commission, and the proposed connection thereof with the railway of Plaintiff was and is—

(a) To enable the Southern Illinois Railway and Power Company and the Illinois Central Railroad Company to invade the coal territory located upon the railway of Plaintiff;

(b) To take from Plaintiff the transportation of coal produced upon and along its railway; and

(c) To compel Plaintiff in legal and economic effect to extend its railway about three miles into new territory and take coal for transportation off (from) the railway of the Illinois Central (Railroad Company);

[fol. 620] (2) That service to the J. K. Dering Coal Company was a mere incident to the general plan and scheme of the J. K. Dering Coal Company, the Illinois Central Railroad Company and the Southern Illinois Railway and Power Company to take (withdraw) coal traffic from the railway of Plaintiff; and

(3) That said track, when connected, would be a connecting railway between the railway of Plaintiff and the railways of the Illinois Central Railroad Company and of the Southern Illinois Railway and Power Company, constructed without a certificate of public convenience and necessity from the Interstate Commerce Commission, in violation of Paragraphs 18 to 22, inclusive, Section 402, of the Transportation Act, 1920;

and, the said orders of the Interstate Commerce Commission are, for the reasons aforesaid, void.

(11) Because said decree did not find that the track constructed by the Illinois Central Railroad Company for and in connection with the J. K. Dering Coal Company constitutes a new connecting railway and is an invasion of the transportation territory of the Plaintiff in violation of Paragraphs 18-22 of Section 402 of the Transportation Act as contained in 1920 Supplement, Federal Stat. Ann., pp. 98-99, without a certificate of public convenience and necessity and is for that reason void.

(12) Because said decree did not find that the construction, maintenance and operation of the track with which it is proposed to connect the railway of the Plaintiff by the proceedings in Docket No. 15,552, lately pending before the Interstate Commerce Commission was lawfully built and that no connection therewith can be lawfully ordered by [fol. 621] the Interstate Commerce Commission under the provisions of Paragraph 9, or (G), of Section 1, of an Act to Regulate Commerce, approved February 4, 1887, and acts amedatory thereof, and the orders of the Interstate Commerce Commission here involved are for that reason void.

(13) Because said decree did not find that, if the track described in the complaint and by the evidence heard in Docket No. 15,552, lately pending before the Interstate Commerce Commission, be held as an industrial or spur-track for the use of the J. K. Dering Coal Company, its construction, maintenance and operation would be within the jurisdiction of the Illinois Commerce Commission and Illinois courts, and if it be held as a connecting track between the railway of the Illinois Central Railroad Company and the railway of the Plaintiff, or as a track in extension of either the railway of the Illinois Central Railroad, or the railway of the Plaintiff, it would be within the jurisdiction of the Interstate Commerce Commission and the Federal courts and would in that event be controlled by Paragraph 18-22, of Section 402 of the Transportation Act, and could not be constructed, maintained or operated without first obtaining a certificate of public convenience and necessity from the Interstate Commerce Commission; that in either event said track as constructed and proposed to be maintained and operated is an unlawful track built contrary to either the laws of the State of Illinois, or the laws

of the United States, and that in ordering a connection therewith the Interstate Commerce Commission exceeded its power, jurisdiction and authority, and that the orders of the commission are, therefore, void.

(14) Because the said decree did not hold and find that Paragraphs 18-22, of Section 402 of the Transportation [fol. 622] Act have so amended and modified Paragraph 9, or (G), of Section 1, of an Act to Regulate Commerce, approved, February 4, 1887, that the Interstate Commerce Commission has no jurisdiction to order a connection between an industrial or spur-track constructed to serve an industry and the railway of an interstate carrier, though said track be useful and used in the transportation of both interstate and intrastate commerce, and no jurisdiction to require such a track or such a connection to be maintained, used or operated in Interstate Commerce, and for that reason the orders of the Interstate Commerce Commission here involved are void.

(15) Because said decree in effect holds that the construction and maintenance of the track with which the connection was sought in the proceedings in Docket No. 15,552, is not within the jurisdiction of the Interstate Commerce Commission, yet holds that the connection between said track and the railway of the Plaintiff is within the jurisdiction of the Interstate Commerce Commission, notwithstanding the provisions of Paragraphs 18-22, Section 402 of the Transportation Act.

(16) Because said decree did not hold and find that if the track with which a connection was sought by the proceedings in Docket No. 15552, lately pending before the Interstate Commerce Commission is not a private side-track, then it was not such a track as is described by the complaint in said cause and would not be within the description of a track within the terms and language of said Paragraph 9, or (G), of Section 1, of an Act to Regulate Commerce, approved February 4, 1887, and the order of the Commission requiring connection therewith is void.

[fol. 623] (17) Because said decree did not find and hold that the finding and orders of the Interstate Commerce Commission to the effect that the track with which the connection was sought is a private side-track within the mean-

ing of Paragraph 9, or (G), of Section 1, of an Act to Regulate Commerce, approved February 4, 1887, is contrary to the facts established by the undisputed evidence contained in the record, and, therefore, the order of the Interstate Commerce Commission so holding and finding is void.

(18) Because said decree does not hold:

(1) That the power, jurisdiction and authority of the Interstate Commerce Commission and the Federal courts over the construction, maintenance and operation of a connection with the proposed track is controlled by the proviso in Paragraph 22, Section 402 of the Transportation Act in relation to spur, industrial, team, switching and side-tracks located, or to be located, wholly within a single state;

(2) That the adjudication of the Illinois Commerce Commission orders in the courts of Illinois, in Illinois docket Nos. 12,819 and 12,891, by the Courts of Illinois, was and is final and conclusive upon the Interstate Commerce Commission and the Federal courts, (a) as an estoppel, (b) by force of Section 1, of Article 4, of the Constitution of the United States, which provides, "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other State;" (c) and, that the construction and application of Paragraph 22, of Section 402 of the Transportation Act, and Section 45 of the Illinois Public Utilities Act, which provides:

[fol. 624] "Every railroad company upon the application of any corporation or person, being a shipper or receiver, or contemplated shipper or receiver of freight, shall make such connection and provide such switches and tracks as may be necessary for that purpose and deliver and receive cars thereover: Provided, that such connection is reasonably practicable and can be installed and used without materially increasing the hazard to the operation of the railroad with which such connection is sought, and the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company," by the Illinois Supreme Court are binding as a precedent upon the Courts of the United States.

(19) Because said decree did not find that the adjudication of the right of the J. K. Dering Coal Company to a track connection between the track described in the complaint in Docket No. 15,552 and of the facts involved in an effort to compel such a connection under Sections 45 and 46 of the Public Utilities Act of Illinois in the courts of Illinois is conclusive as an estoppel upon the J. K. Dering Coal Company and the United States as its representative in this proceeding to allege, claim or prove to the contrary of such adjudication and the findings of fact therein either before the Interstate Commerce Commission or the courts of the United States, and for that reason the orders of the Interstate Commerce Commission in said cause are void.

(20) Because said decree does not find that the Interstate Commerce Commission failed to make sufficient findings of fact in case, Docket No. 15,552, as a basis for the orders of said Commission entered therein, and that for that reason the said orders are null, void and of no effect.

[fol. 625] (21) Because said decree did not find that the Interstate Commerce Commission neglected and refused to make findings of fact upon all of the material issues presented by the complaint and answer thereto in case, Docket No. 15,552, namely, upon the issues:

(a) Whether said track was constructed for the purpose of enabling the Illinois Central Railroad and the Southern Illinois Railway and Power Company to invade the coal transportation field then occupied by the Plaintiff.

(b) Whether the construction of said track was reasonably necessary to enable the J. K. Dering Coal Company to reach the coal markets to which coal produced at its mine No. 2, might be shipped in Interstate Commerce.

(c) Whether the existing track connection between the Illinois Central and the railway of the Plaintiff was or was not a sufficient and adequate outlet to the railway of the Plaintiff from the J. K. Dering Coal Company mine No. 2, to the markets available to be reached over the railway of the Plaintiff.

(d) Whether on the whole the construction of such track would result in a net revenue to the Plaintiff sufficient to

justify the construction, maintenance and operation of the track connection ordered,

and that for the failure of the Interstate Commerce Commission to make findings upon these issues its order is null, void and of no effect.

Geo. B. Gillespie, Solicitor for Plaintiff. H. N. Quigley, S. W. Baxter, of Counsel.

[fols. 626-632] Bond on appeal for $250.00, approved and filed July 10, 1926, omitted in printing.

[fol. 633] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 634-637] Citation, in usual form, showing service on Clarence B. Cardy, Blackburne Esterline and P. J. Farrell, filed July 15, 1926, omitted in printing.

[fol. 638] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation by Appellant of Parts of Record to be Printed, with Proof of Service—Filed August 6, 1926

To Attorney General of the United States, Interstate Commerce Commission of the United States, J. K. Dering Coal Company:

You and each of you will take notice that upon a delivery of the annexed instrument to you, a copy of the same with service upon you and each of you will be filed in the office of the Clerk of the Supreme Court of the United States at Washington, D. C.

H. N. Quigley, S. W. Baxter, Geo. B. Gillespie, Attorneys for Appellant.

[fol. 639] IN SUPREME COURT OF THE UNITED STATES

Pursuant to Paragraph 9, Rule 11, of the Rules of the Supreme Court of the United States, the Appellant herewith files in the office of the Clerk of the Supreme Court of the United States a definite statement of the points on which it intends to rely and of the parts of the record which it thinks necessary for the consideration thereof with proof of service of a copy of the same on the adverse parties.

A Definite Statement of the Points on Which Appellant Intends to Rely

The order and judgment of the District Court dismissing the Complainant's bill should be reversed and the orders of the Interstate Commerce Commission should be set aside and held for naught:

[fol. 640]

I

Because Paragraph "G" (or 9) of Section 1, of the Interstate Commerce Act was modified by Paragraphs 18 to 22 of Section 402 of the Transportation Act and a new policy established by which side, spur and industrial tracks were completely excluded from the jurisdiction of the Interstate Commerce Commission and committeed to the jurisdiction of the several states, and if the track in controversy is a side-track within the meaning of said Paragraph "G" (or 9) the Interstate Commerce Commission had no jurisdiction to require its connection, maintenance or disconnection, and if not no jurisdiction was conferred by the petition or complaint filed herein.

II

Under the settled law and the facts of the record with all allowable inference in support thereof no case is established by the evidence contained in the record for these reasons:

(a) The Complainant was not a shipper on Defendant's railway:

(b) The proposed connection is not reasonably practicable;

(c) It could not be put in with reasonable safety;

(d) It would not furnish sufficient business to justify the the construction and maintenance of the same;

[fol. 641] (e) The track in controversy was built contrary to law and in contemplation of law is no track;

(f) The track is not a private side-track as alleged, but a connecting railway.

III

The findings of the Commission are predicated upon immaterial facts, and the Commission omitted to make findings upon material issues presented by the pleadings and evidence.

IV

The record shows that the J. K. Dering Coal Company first elected to proceed under a similar statute of the State of Illinois to obtain a connection between the track here involved and the railway of Appellant and relied upon substantially the same facts as are here involved. And adjudication of the issues in that case, therefore, is conclusive of the issues of material fact adjudicated as between the Appellant and the Dering Coal Company in this proceeding as to the status, relations of the parties and the application of the laws of Illinois thereto, and the J. K. Dering Coal Company was in law estopped to proceed upon the same matter before the Interstate Commerce Commission and, therefore, its petition should have been dismissed.

Statement of the Parts of the Record Which Appellant Thinks Necessary for the Consideration of the Foregoing Points

[fol. 642] Memorandum of Parts of Record to be Printed

Record pages

2. Bill filed April 8, 1926. (This to include the printed bill and exhibits.)
5. Order, April 8, 1926, setting cause for hearing on application for temporary injunction and directing notice. (This to include only the order proper—and not include recitals.)

8-10. Returns of Marshals of Northern District of Illinois and of the District of Columbia filed April 14, 1926, showing service on Attorney General, Interstate Commerce Commission and J. K. Dering Coal Company.

12. Order of Court, April 17, 1926, denying temporary injunction and exceptions, and order requiring filing briefs on merits and setting case for hearing on merits 9:30 a. m., April 24, 1926. (To be copied in full.)

13. April 17, 1926, intervention of the Interstate Commerce Commission.

17-21. April 27, 1926, answer of United States by Blackburn Esterline, Assistant Solicitor General.

24-29. April 17, 1926, answer of Interstate Commerce Commission by E. M. Reidy, Attorney.

30-33. April 27, 1926, answer of J. K. Dering Coal Company. Affidavit of C. B. Cardy.

38. Order April 17, 1926, allowing substitution of certified copy of record of Interstate Commerce Commission.

[fol. 643] 39. Order of April 24, 1926, dismissing bill as to Illinois Central Railroad Company, Southern Illinois Railway and Power Company and of hearing on the merits, dismissal of bill for want of equity and exceptions.

40-49. April 24, 1926, remarks of Judge Evans for Court showing dismissal of bill at conclusion of Plaintiff's evidence and denial of motion for the stay order pending an appeal from an order of the Court. (Print parts marked on left margin pp 40 to 49 and omit other parts of the reporter's notes. Note particularly motion for stay order and denial thereof 46-49.)

50. May 15, 1926, Motion to make abridgement of record part of transcript of record.

52. Order of May 28, 1926, extending time to docket and file record to August 2, 1926.

Record page

53. Order May 26, 1926, extending time for appellees to submit separate abridgement of record to July 1, 1926.

54-67. Praecipe filed June 9, 1926, with proof of service on Esterline representing the Solicitor General, Reidy representing Interstate Commerce Commission, and Sheean and Cardy representing the J. K. Dering Coal Company.

68-69. Motions of Defendants July 1, 1926, for acceptance and substitution of abridgement prepared by appellees in lieu of that submitted by appellant.

70-226. July 1, 1926, abridgement of record on motion of appellees to be printed in full.

228-230. Exhibit No. I, of record and a part of abridgement.

[fol. 644] 231. Exhibit II. (Print exhibit and map annexed.)

232. Exhibit III. Receipt of January 22, 1924, showing mailing at Chicago of notice of request to install switch connection.

234. Exhibits V and VI. These are blue-prints of the railway layout and profile. (Print map and omit profile.)

235-249. Exhibit VII, of 14 photographs. (Omit all except those on pp 239, 241, 246, 247.)

250. Exhibit VIII. (Print this exhibit as it appears.)

252-259. Exhibit IX. (May be omitted if reference be made to a copy of contract in exhibit to bill pp 127-132 and that be printed, or vice versa if printed here may be omitted with proper reference from printed bill at pages named.)

260. Exhibit X. (Omit as immaterial.)

261. Exhibit XI. (Omit as immaterial.)

261-274. Exhibit XII. (Print.)

275-276. Exhibit XIII. General Order No. 15. (Omit as immaterial.)

277. Exhibit XIV. Statement of potential operating time. (Print as contained in record.)

278. Exhibit XV. Potential operating time August 23 to December 23. (Print as contained in record.)

Record pages

279. Amended Exhibit XV. Freight rate on coal from Eldorado to Illinois points. (Omit as immaterial.)

[fol. 645] 289. Exhibit XVI. Recapitulation of comparison of hours work with potential operating time means having and not having Big Four service. (Print as contained in record.)

291-291½. Exhibit XVIII. Statement of actual cost of construction of track. (Print as contained in record.)

292-293. Exhibit XIX. Statement of rates and divisions of divers points. (Omit as immaterial.)

293. Exhibit XX. Statement of rates and divisions to divers points. (Omit as immaterial.)

295-297. Exhibit XXII. Copy of petition of Illinois Central, J. K. Dering Coal Company and Southern Illinois Railway and Power Company. (Omit here and cite Page 425, parts of record of Supreme Court of Illinois which contain a copy of said petition.)

297-370. Exhibit XXIII. Abstract of oral evidence and proceedings before Illinois Commission abridged for printing as follows:

(In describing the parts of Exhibit XXIII to be printed the same will be specified by pages of the exhibit numbered at the top thereof.)

Exhibit margin page

1. Print all of Page 1 of Exhibit XXIII beginning at the top and ending at the words "near Eldorado" in line 14.

3. Print all of Page 3 of Exhibit XXIII beginning at the words "the mine is located" in line 3, to the end of the page.

[fol. 646] 4. Print all of Page 4 of Exhibit XXIII.

5. Print that part of Page 5 of Exhibit XXIII, beginning at the words "Exhibit No. III" to and including the words "distance of about one mile" on the same page.

8. Print that part of Page 8 beginning with the words "the original" third line from the top and include the remainder of said page.

Exhibit margin page

10. Print that part of Page 10, Exhibit XXIII commencing with the words "the commercial necessity" and include the remainder of said page.
11. Print Page 11 of Exhibit XXIII.
12. Print that part of Page 12 from the top to and including the words "present time" in line 5 of said page.
13. Print that part of Page 13 of Exhibit XXIII beginning at the words "Exhibit XIV" to the end of said page.
14. Print the first paragraph on Page 14 of Exhibit XXIII.
16. Print that part of Page 16 near the middle of said page as follows: "The Complainant is ready, able and willing to pay the prevailing freight charges that would be assessed on mine coal from this mine to points in Illinois shipped over the Big Four."
17. Print all of Page 17 of Exhibit XXIII.
18. Print all of Page 18, of Exhibit XXIII.
19. Print all of Page 19, of Exhibit XXIII.

[fol. 647] 20. Print all of Page 20, of Exhibit XXIII.

21. Print all of Page 21, of Exhibit XXIII.
22. Print that part of Page 22 ending with the words, "(Testimony 82-86)" on said page.
23. Print the last line of Page 23, of Exhibit XXIII.
24. Print all of Page 24, of Exhibit XXIII.
25. Print all of Page 25, of Exhibit XXIII.
26. Print all of Page 26 of Exhibit XXIII.
27. Print that part of Page 27 of Exhibit XXIII to and including the words "my business" at the end of the second paragraph on said page.
28. Print all of Page 28, of Exhibit XXIII.
29. Print that part of Page 29 of Exhibit XXIII to and including the words, "present lines" at the end of the first paragraph of said page.
30. Print that part of Page 30 of Exhibit XXIII beginning with the words "I said this morning" to the end of said page.

Exhibit margin page

31. Print that part of Page 31 of Exhibit XXIII down to and including the words "Q. You agreed to that. A. Yes, sir." on said page.
33. Print all of Page 33 of Exhibit XXIII.
[fol. 648] 34. Print that part of Page 34 Exhibit XXIII down to and including the word "Redirect Examination."
35. Print all of Page 35 of Exhibit XXIII.
36. Print all of Page 36 of Exhibit XXIII.
37. Print all of Page 37 of Exhibit XXIII.
38. Print all of Page 38 of Exhibit XXIII.
39. Print all of Page 39 of Exhibit XXIII.
40. Print all of Page 40 of Exhibit XXIII.
41. Print all of Page 41 of Exhibit XXIII.
42. Print all of Page 42 of Exhibit XXIII.
43. Print all of Page 43 of Exhibit XXIII.
44. Print all of Page 44 of Exhibit XXIII.
45. Print all of Page 45 of Exhibit XXIII.
54. Print that part of Page 54 of Exhibit XXIII beginning with the words "Mr. Stevenson recalled." to the end of the page.
55. Print all of Page 55 of Exhibit XXIII.
63. Print that part of Page 63 of Exhibit XXIII beginning with the words "J. Paul Clayton" down to and including the word "manager" in the second paragraph of said page.
[fol. 649] 65. Print that part of Page 65 of Exhibit XXIII beginning with the words "those trains" in the second line of said page to the end of the page.
66. Print all of Page 66 of Exhibit XXIII.
67. Print all of Page 67 of Exhibit XXIII.
68. Print all of Page 68 of Exhibit XXIII.
69. Print all of Page 69 of Exhibit XXIII.
70. Print that part of Page 70 included in the first paragraph and ending with the words" (Tes. 333-336)."
74. Print that part of Page 74 of Exhibit XXIII beginning with the words "Cross Examination."
75. Print all of Page 75 of Exhibit XXIII.

Record page

371-385½. Exhibit XXIV. Certified copy of file mark showing filing of appeal in the Circuit Court and all other papers following thereafter as the same appear of record as a part of that exhibit.

386-393. Exhibit XXV. Order of the Illinois Commerce Commission granting authority to the Illinois Central Railroad Company to construct track in Illinois Commission Docket No. 12,819. (Print only the part of said order beginning on the 4th page thereof with the words "It is Therefore Ordered" and include the remainder thereof to the end.)

[fol. 650] 394. Exhibit XXVI. Map showing geological survey and location of coal-mines in the State of Illinois.

396. Exhibit XXVII. Brief of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company. (Omit entirely.)

397-398. Exhibit XXVIII. Fenton showing average number of loaders and average tons.

399. Exhibit XXIX. Blickensderfer Map.

400. Exhibit XXX. Stokley. Map and profile one document.

401. Exhibit XXXI. Stevenson's statement of shipments from territory.

402. Print all parts of the record subsequent to this exhibit XXXI in accordance with the rules of the Court.

[fol. 651] State of Illinois,
County of Cook, ss:

Geo. B. Gillespie, being duly sworn on oath says that on the 4th day of August, A. D. 1926, he served a true copy of the foregoing Instrument on the J. K. Dering Coal Company by delivering a copy thereof to James M. Sheean and C. B. Cardy, its attorneys, who appeared for it in said cause in the District Court of the United States.

Geo. B. Gillespie.

Subscribed and sworn to before me this 4th day of August, A. D. 1926. W. S. Jameson, Notary Public. (Seal of W. S. Jameson, Notary Public, Cook County, Ill.)

[fols. 652 & 653] CITY OF WASHINGTON,
District of Columbia, ss:

Charles N. Osgood, being duly sworn, on oath says that he served a true copy of the foregoing on the United States and the Interstate Commerce Commission by delivering a true copy thereof to each, for the United States to Blackburn Esterline, Assistant Solicitor General of the United States, and for the Interstate Commerce Commission to E. M. Reidy, Attorney for the Interstate Commerce Commission who appeared for said respective parties at the hearing of said cause in the United States District Court.

Charles N. Osgood.

Subscribed and sworn to before me this 6th day of August, A. D. 1926. John F. A. Becker, Notary Public, D. C. (Seal of John F. A. Becker, Notary Public, District of Columbia.)

[fol. 654] [File endorsement omitted.]

[fol. 655] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1926

DESIGNATION OF ADDITIONAL PARTS OF THE RECORD FOR PRINTING—Filed August 25, 1926

To the Clerk:

All of the testimony and numerous of the exhibits having been reduced to narrative form under Equity Rule 75 at the time the appeal was perfected in the District Court, and counsel for the appellant having designated for printing on the appeal only parts or fragments of the narrative of the testimony and, in many instances, only excerpts from either the exhibits or the narrative thereof, the appellees, United States of America and Interstate Commerce

7

Office Supreme Court
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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

No. 95.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA and J. K. DERING COAL COMPANY,
Appellees.

Appeal from the District Court of the United States, Northern District of Illinois, Eastern Division.

BRIEF OF APPELLANT.

(32,095)

GEO. B. GILLESPIE,
Attorney for Appellant.

Of Counsel:
H. N. QUIGLEY,
S. W. BAXTER.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

No. 95.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Appellant, v. THE UNITED STATES OF AMERICA and J. K. DERING COAL COMPANY, Appellees.	Appeal from the District Court of the United States, Northern District of Illinois, Eastern Division.

BRIEF OF APPELLANT.

(32,095)

STATEMENT.

Grounds Upon Which Jurisdiction of This Court Is Invoked.———This is an appeal to review a decree of the United States District Court for the Northern District

of Illinois, Eastern Division, dismissing a petition in chancery for want of equity. The petition or bill was filed by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company against the United States of America, J. K. Dering Coal Company, Illinois Central Railroad Company and the Southern Illinois Railway & Power Company on April 8, 1926 (R. 1), and prayed for a decree to set aside and annul an order of the Interstate Commerce Commission, and for certain injunctive relief, in the exercise of the jurisdiction of that Court under Section 41, Par. 28, of the Judicial Code (2 Mason's U. S. Code, pp. 1972-1997). Before the final decree the petition or bill was dismissed on the motion of the plaintiff as to the Illinois Central Railroad Company and the Southern Illinois Railway & Power Company (R. 162). The case was finally heard before Honorable Evan A. Evans, United States Circuit Judge, Honorable James H. Wilkerson, District Judge, and Honorable Adam C. Cliffe, District Judge, and on April 24, 1926, a decree was entered dismissing the petition or bill of complaint (R. 162). The cause was regularly appealed to this Court and jurisdiction depends upon Section 345 of the Judicial Code as amended (Sec. 345, Judicial Code, 2 Mason's U. S. Code 1926, p. 2102). The case was first heard on a motion for temporary injunction which was denied. Answers were filed and issues made upon the sufficiency of the record of the Interstate Commerce Commission to sustain its order. The question decided in the affirmative by the

court below was whether the Interstate Commerce Commission upon the record could lawfully require a switch connection between a track of the J. K. Dering Coal Company extended from its coal mine located on the Illinois Central Railroad, across the railway of that company, an intervening electric railway and three public highways, a distance of three miles to the railway of the plaintiff. This connection was ordered by the Interstate Commerce Commission under the provisions of Par. 9, of Sec. 1 of the Interstate Commerce Act, which is as follows:

> "*Any common carrier subject to the provisions of this chapter,* upon application of any lateral, branch line of railroad, or of *any shipper tendering interstate traffic for transportation,* shall construct, maintain and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad *or private sidetrack which may be constructed to connect with its railroad,* where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. * * *"
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> 2 Mason's U. S. Code 1926, p. 3487.

The substantial sufficiency of the bill was not questioned and the questions raised by the issues were of law arising from a practically admitted state of facts. In order to present those questions here it will not be necessary to

state the pleadings in the District Court, as the issues actually involved here are those raised before and decided by the Interstate Commerce Commission.

The J. K. Dering Coal Company, hereafter called the appellee, filed before the Commission a complaint stating these alleged material facts: (1) The existence of the petitioner, the J. K. Dering Coal Company, which we shall hereafter refer to as the appellee, *as a private business* corporation organized by its charter to produce and sell coal; (2) That the defendant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, which we shall hereafter refer to as the appellant, is a common carrier in interstate commerce; (3) That the appellee owns and operates a coal mine located about two and one-half miles northwest of a connection between the rails of appellant and the rails of the Illinois Central Railroad in Eldorado, Illinois, on the northeast side of the railroad tracks and right of way of the Illinois Central Railroad Company, and is engaged in producing and selling coal, having markets chiefly in Illinois, Indiana, Iowa and Wisconsin; (4) That appellee had built and owns a railroad switch track from its coal mine to the right of way of the appellant's railroad at a cost of $100,000; (5) That appellee had made written application to the appellant for a switch connection between the railroad of the appellant and the switch track of the appellee; (6) That the appellant had refused to make such connection; (7) That the connection is reasonably prac-

ticable, can be put in with safety and used without materially increasing the hazard of operation; (8) That the business which may reasonably be expected to be received by appellant from the appellee over said connection will be sufficient to justify the expense; (9) That the switch track connection is necessary to transport to destination coal produced at the mine of the appellee (R. 84-88). The answer puts in issue each and every of these allegations and states additional facts upon which the appellant relied as follows:

(1) The appellee, being a private corporation with only authority to produce and sell coal, has no power under its charter to build, operate, maintain or lease a railroad either for its own use or for the use of others, and, as built, this is a railroad and not a switch track; (2) Appellant admitted that it is a common carrier subject to the provisions of the Interstate Commerce Act, but averred that since the appellee has a direct connection with the Illinois Central, ample to furnish it with adequate service, and is not located on the railway of the appellant, and is not, therefore, entitled to a switch connection with appellant railroad, that it does not lie within the power of the Interstate Commerce Commission to compel a connection with appellee's track for the purpose of giving it additional car supply, or to give it the status of an industry on the railway of the appellant, when it is in fact not so located, and that to compel the connection would in effect require the appellant to extend its railway to

a point where it does not choose to locate it, and where no obligation rests upon it to extend it, and that such an order would be a violation of the due process and equal protection of law clauses of the Fourteenth Amendment to the Constitution of the United States and violate Pars. 18 to 22, Sec. 1, of the Interstate Commerce Act as amended, which requires a certificate of public convenience and necessity before commencing the construction of a new railroad, or the extension of an existing railroad; (3) Appellant admitted that the mine of appellee is located two and one-half miles from its railway, and avers that the same is located on the railway of the Illinois Central, and alleged that it has adequate railway facilities to deliver carload production therefrom to the railway of appellant through a connection at Eldorado, Illinois, and to reach its railway; that the proposed track would cross two railroads and three public highways; (4) Appellant averred that the nearest approach of the appellee's mining property to the railway of appellant is approximately a half mile; (5) Appellant denied that the proposed track connection would be a connection between mine spur or private sidetrack from an industry, but averred that it would constitute in fact and under the law a connecting public railroad between the railways of the Illinois Central and the appellant, and the railway of the Southern Illinois Railway & Power Company and the Illinois Central, and an extension of said railways without a certificate of public convenience and necessity either for the construction of a

new connecting public railway, or for the extension of either of said railways; (6) Appellant averred that the Constitution of Illinois constitutes such a railway as appellee has built a public railway free for the transportation of passengers and freight, and alleged that it is in no sense a sidetrack within the meaning of Section 1, Par. 28, of the Interstate Commerce Act; (7) Appellant averred that appellee had and enjoyed adequate railway facilities and that if it was entitled to relief such relief would be through the regulation of rates and the establishment of joint through rates and routes (R. 88-96). Attached to and made a part of the answer as exhibits are copies of contracts, Exhibit A, made December 20, 1922, between the Illinois Central Railroad Company, party of the first part, and J. K. Dering Coal Company, party of the second part (R. 97-103), and Exhibit B, an agreement between J. K. Dering Coal Company and the Southern Illinois Railway & Power Company (R. 97-99), which contracts refer to each other and make a tri-party agreement.

The findings of the Commission are shown by its report of the approving the tentative report of the Examiner (R. 116-129), and upon further argument before the entire Commission (R. 130-133). The order entered by Division No. V was affirmed (R. 134), and there was no substantial modification of the original tentative report.

It will be observed from a reading of the report adopted by Division V that the following issues were selected as

being the material issues presented by the record: (1) Whether the building and maintenance of such a track is beyond the scope of the powers granted to the appellee by its Illinois charter; (2) Whether such a track, by reason of contracts between the appellee and the Illinois Central, and the appellee and the Power Company, will under the law of Illinois become a public track and be a part of the public highway of the railway with which it shall be connected; and, that the order requiring the connection sought would in legal effect require an extension of plaintiff's line to a point not connected to and would be in effect a taking of its property without due process of law and a denial to it of the equal protection of the law; (3) Whether the making of the proposed connection would complete a new connecting railway between the Illinois Central and the railway of the appellant without a certificate of public convenience and necessity having first been obtained as required by the Illinois Commerce Act and the Interstate Commerce Act, as amended by the Transportation Act; (4) Whether the connection would be reasonably practicable or could be put in with safety, or would furnish sufficient business to justify construction and maintenance. It was then said by the Commission:

> *"The first two contentions are primarily matters of judicial interpretation. They will not be further considered here."*

(These questions were involved in the order entered by the Commission and decided adversely to appellant.)

As to the third specification it was said:

> "To this we do not agree. *We are not called upon to determine what effect the contracts heretofore referred to may have in the event of operation of the mine track by the Central or the Power Company is undertaken.*"

(If these contracts determine the character of the track to be built, as to whether public or private, lawful or unlawful, a sidetrack, connecting railway or extension of railways, we insist they were material and should have been considered. If not within federal jurisdiction to consider their effect, then it was within state jurisdiction and the conclusions of the Illinois Legislature and courts should have been accepted as binding.)

The only question left which the Commission treated as an issue is the fourth specification which depended upon the evidence, and since there was evidence upon both sides the findings of the Commission eliminate it as a question before this Court. Reference to the exceptions filed to the report will show that the report was excepted to upon the grounds: (1) That it did not make specific findings upon the material issues. (2) That it did not pass upon the issues presented by the answer and supported by the evidence. (3) That it did not suggest specific findings of fact or recommend an order of the

Commission based on specific findings of fact and did not embrace all of the material facts as mentioned in the way of recital, and that such facts as were mentioned were by way of recital and not by way of findings. (4) That the recommended finding that the petitioner had tendered interstate traffic within the meaning of Section 1, Par. 9, of the Interstate Commerce Act was contrary to the facts and the law. (5) That the recommended report declined to pass upon two out of four of the material issues which it found presented and a material part of the evidence bearing upon a third. There were other exceptions which it is not necessary to mention more in detail at this time.

An examination of the exceptions filed will show that every conceivable phase of the report of the Commission was excepted to sufficiently to enable the appellant to here raise any question presented by the issues formed by the original complaint and answer (R. 448-450). The detail of the several exceptions is omitted from the printed record as the printed parts show, but the omissions are not thought to be material. In dismissing the bill the trial court affirmed the order of the Commission against these exceptions and decided all of the questions raised upon the record against appellant, leaving all questions presented to the Commission, except those of controverted fact, open for this Court. Here we shall present for consideration only such questions as were passed upon or declined by the Commission not involving

any controversy of fact. It will be incidentally apparent from an examination of the record and the order of the Commission that many of its findings of fact were without evidence to support them, or were directly in conflict with uncontroverted evidence, and so far as we deem them material we shall call attention to such errors, but shall emphasize the errors of law which we state as follows:

Order of Commission Involved Fundamental Errors of Law.———The following fundamental principles based upon the undisputed facts contained in the record were disregarded by the Interstate Commerce Commission in making its findings and order:

(1) Appellee is not a shipper on the railway of appellant tendering interstate traffic to appellant for transportation within the meaning of Paragraph 9, Section 1 of the Interstate Commerce Act. It is a shipper on the railway of the Illinois Central Railroad Company enjoying adequate service from that company and may regularly tender interstate traffic to it which it may deliver to appellant over a switch connection with the Illinois Central at Eldorado. It has constructed a track from its mine connections with the Illinois Central Railroad to the railway of appellant without legal right or authority either under the laws of the United States or the laws of the State of Illinois, to maintain or operate said track. It follows that the Interstate Commerce Commission has coerced appellant to make a switch connection with an unlawful track of appellee to enable the Illinois Central to deliver coal

thereover to the railway of appellant and to draw coal for transportation from the railway of appellant produced on its rails in competition with appellant; that appellant is required to accept this connection and perform this service for a corporation to whom it owes no duty as a common carrier and to its disadvantage as a competing railway with the Illinois Central.

(2) The track with which the Interstate Commerce Commission ordered appellant to "*construct, maintain* and *operate*" a "*switch connection*" with appellant's railway is not "*a private track*" which "*may be constructed*" within the meaning of Paragraph 9, Section 1 of the Interstate Commerce Act.

(3) The track with which the Interstate Commerce Commission ordered appellant to make a switch connection is not a private sidetrack that "*may be constructed*" within the meaning of Paragraph 9, Section 1 of the Interstate Commerce Act. Whether it is a track that "*may be constructed*" within the meaning of that section is a question committed solely to the jurisdiction of the Illinois Commerce Commission and the courts of Illinois by Paragraph 22 of Section 1 of the Interstate Commerce Act. Sections 55 and 58 of the Illinois Commerce Act prohibit the construction of such a track. It, therefore, follows, that the express language of Paragraph 9 of Section 1 of the Interstate Commerce Act does not include the kind of track connected under the order of the Interstate Commerce Com-

mission—that is, it is not a track that "*may be constructed*" within the meaning of the language of that paragraph (Sec. 9, p. 922, Interstate Commerce Act, Revised Code, Title 49, Sec. 1, Mason's U. S. Code, pp. 3487-3489; Illinois Commerce Act, Secs. 55, 58, 1926 Cahill, pp. 1902-1903; Western & Atlantic v. Georgia Public Service Commission, 267 U. S. 495; 69 L. ed. 756-757; The C. C. C. & St. L. Ry. Co. v. Illinois Commerce Commission, 315 Ill. 461; Texas & Pacific R. Co. v. Gulf, Colo. & S. F. R. Co., 270 U. S. 266-279; 70 L. ed. 578).

(4) The Interstate Commerce Commission held that the track with which it ordered the connection is not a connecting railway or an extension of railways within the meaning of Pars. 18 to 21, Sec. 1 of the Interstate Commerce Act, but is a sidetrack within the meaning of paragraph 9 of section 1 of that act. Paragraph 22 of section 1 of the act expressly excludes the question of construction and maintenance of sidetracks from the jurisdiction of the Interstate Commerce Commission. Sections 54, 55 and 58 of the Illinois Commerce Act expressly prohibit the construction of a sidetrack across other railways or over highways without a certificate of public convenience and necessity, and the Supreme Court of Illinois has held that this track was unlawfully constructed. It follows that the Interstate Commerce Commission has ordered appellant to make a connection with a track built in violation of the laws of Illinois, which cannot be maintained, and, therefore, its order is unlawful.

(5) The switch connection which the Commission ordered appellant to make would complete a connecting railway between the railway of the Illinois Central and the railway of appellant, and also extend both railways without a certificate of public convenience and necessity as required by Paragraphs 18 to 21, Section 1 of the Interstate Commerce Act.

(6) Completed according to the terms of the contracts under which the Dering track was constructed, the intent of the parties and the force of the Constitution of the State of Illinois, said track would be a connecting railway between the railways of the Illinois Central Railroad Company, Southern Illinois Railway & Power Company and appellant without a certificate of public convenience and necessity, in violation both of Paragraphs 18 to 22, Section 1 of the Interstate Commerce Act, and Sections 55-58 of the Illinois Commerce Act.

(7) By electing to apply to the Illinois Commission for an order to compel appellant to make a switch connection with its track and adjudicating the questions of law and fact arising in said proceedings in the Illinois courts and not appealing from the final judgment of the Supreme Court of Illinois, appellee is estopped to deny the jurisdiction of the Illinois Commission and the conclusions of fact adjudicated and determined by the courts of Illinois in proceedings to contest the validity of the order of the Illinois Commission authorizing the construction of the track and requiring the appellant to connect its railway

therewith, and the final conclusions of the courts of Illinois are conclusive and binding.

A Concise Statement of the Case—The Locus in Quo. ——Appellant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, known under its trade name "Big Four," has a line of railroad extending from Danville, in Vermilion County, Illinois, to Cairo, in Alexander County, in the same state, through Saline County, in a southwesterly and northeasterly course. It has no railway extending from Danville to Chicago and is dependent upon other railways to carry coal from its northern terminus to that city. It is crossed by the St. Louis-Cleveland main line of its railway at Paris, and has a line extending from Springfield, Ohio, through Indianapolis to Peoria. The St. Louis-Eldorado Branch of the Illinois Central Railroad extends from St. Louis, Missouri, through Belleville and Duquoin, Illinois, at which point it crosses the Chicago-New Orleans line of the Illinois Central to Eldorado, in Saline County, Illinois, and there connects with the railway of appellat and regularly exchanges traffic between the railway of appellant and its system. It also has numerous branches extending into the coal fields of Southern Illinois from its St. Louis-Eldorado line in Perry, Franklin and Williamson counties, and has several mines on its railway at and in the neighborhood of Eldorado and is building a new line, the Effingham, Illinois, Fulton, Kentucky, cut-off, through the coal fields of Saline County, over which it will carry its through traffic from Chicago

to New Orleans, and which line connects with its present main line at the points named.

This general situation is shown by Exhibit XXVI, a map of the geological survey, locating the mines in the State of Illinois (R. 428); a map of Mr. Blickensderfer, Exhibit XXIX, showing the location of the mines in Saline County, the present proposed track and the proposed cut-off of the Illinois Central, which is in course of construction (R. 431); Exhibit XXXIII, a map of the State of Illinois, showing the location of the lines of the Illinois Central and Big Four and other railroads within the coal territory of the state (R. 434); Exhibit XXX, Stokeley, showing an illustration on a scale of the proposed track, the track and outlay of the Dering mines on the Illinois Central and the proposed connection with the railway of appellant (R. 431, being the second item after page 430, which bears no number).

Appellant has a first and second main track extending from Carrier Mills, a point about seven miles south of Harrisburg, north to Eldorado, a distance of about fourteen miles. The second main, being the west track, the connection with appellee's track, is at a point about four miles south of Eldorado and three and one-half miles north of Harrisburg. There are a large number of mines located along the main track between Eldorado and Carrier Mills. Appellant has a large switching and assembling yard at Harrisburg where cars are taken for distribution, thence taken over these lines to the mines, loaded, returned

to the mines and classified in trains for movement to market. When loads are ready for movement the clerks of the coal companies notify the railroad officials, the coal is billed at Harrisburg, all move on the same rate to market and are taken by the railway company from the mines on its railway to Harrisburg, classified and moved under the billing in trains to market. The movement to market is from the respective mines to the point of destination. This is fully explained in the testimony of Mr. Pauley (R. 362-369) and Mr. Milligan (R. 401-403), and the location of the mines is shown on the Blickensderfer Exhibit No. XXIX (R. 429).

By referring to the map made a part of the bill (R. 33) and the testimony of Mr. Stokeley (R. 285), it will appear that from the Dering mine to the connection of the Illinois Central with the Big Four in Eldorado is 3.35 miles. (This has been referred to as 2½ miles, but the engineer's figures are correct.) From Harrisburg north to the connection ordered by the Commission is 3.1 miles; from this connection to Eldorado 4.3 miles; from the point of the switch of the Illinois Central at Dering mine to the connection of the new track with the track of appellant is 2.9 miles. The Wasson mine is located within reach of the connection and between the track of the Southern Illinois Railroad & Power Company and the track of appellant (R. 33). The arrangement between the Illinois Central and appellee was that the Illinois Central should also have access to the Wasson mine, and it was an agreement, not expressed

in contracts that were executed at the time, that this was a necessary condition to the contract made between the Illinois Central and appellant for the construction of this track (R. 356, 381). Mr. Pauley said: "It is only on condition that the Illinois Central can have access to the Wasson mine that it is making this arrangement." If this track shall remain connected with the rails of the Illinois Central and the rails of appellant it will give the Wasson mine the right under the Constitution of Illinois to use it as a public track (The C. C. C. & St. L. Ry. Co. v. Illinois Commerce Commission, 315 Ill. 461).

The appellant has a number of mines located on its line at Eldorado, between Eldorado and Harrisburg, and on its Harco Branch extending westerly from Harrisburg. This appears from the Blickensderfer map to which we have called attention. The coal development in Saline County occurred about the year 1905, and the appellant at that time spent a large sum of money, several millions of dollars, in reconstructing its line and providing facilities to carry coal traffic then developed, and in prospect, and is dependent upon that traffic to earn a fair return on its investment. Shortly subsequent to that date the predecessor of the Southern Illinois Railway & Power Company built an electric line from Carrier Mills paralleling the line of appellant on the west side of its railway from Carrier Mills, a point several miles south of Harrisburg northeasterly through Harrisburg to Eldorado. It was built as an electric interurban railroad and has

since that time until the present been operated as such. The changing conditions have inspired this company to endeavor to enter the general field of railway transportation, as will appear from the statements of its vice-president to which we shall hereafter draw attention. About midway between Eldorado and Harrisburg, approximately 4 miles south of Eldorado, is located what is known as Wasson Mine No. 1, to which we have drawn attention. Prior to the location of appellee's mine No. 2 it owned and was operating a coal mine called Dering Mine No. 3, located northeast of Eldorado, a mile or more, on the railway of appellant.

The J. K. Dering Coal Company acquired a tract of land in excess of 3,000 acres upon which its mine No. 2 was located, as shown by map (R. 33). This tract of land does not touch the railway right-of-way of appellant at any point and its nearest approach to it is approximately one-half mile from its right-of-way (R. 357). The track connection ordered is between the main line of appellant's railway and a track constructed by the Illinois Central Railroad Company under contracts with the J. K. Dering Coal Company from Dering Mine No. 2 to the railway of appellant at a point southwest of Wasson Mine No. 2, as shown by the plat just referred to.

Prior to the location of mine No. 2, there were some negotiations between appellant and the Dering Company in an effort to make an arrangement by which appellant and the Illinois Central under a reciprocal switching ar-

rangement would treat the Dering Mine No. 2 and Dering Mine No. 3 as joint mines on both railways (R. 357, 358), at a time when the production of mine No. 2 became equal to that of mine No. 3 (R. 186). No definite agreement was reached. The only influence these negotiations had upon the location of Dering Mine No. 2 was that according to the testimony of the vice-president of the Dering Company the mine would probably have been located on the west side of the tracks of the Illinois Central instead of the east side of its tracks (R. 185). The time when it was contended by the Dering Company that the production of its mine No. 2 had reached a practical equivalent in quantity to that of its mine No. 3 arrived in the year 1917 during federal control of railways by the Director General.

Director General and Interstate Commission and Not Appellant Responsible for Failure of Reciprocal Switching Arrangement of Dering Mines Case.———The Dering Company applied to the railway companies to put the reciprocal switching arrangement in force which had previously been discussed, and the officers of the Director General operating the Big Four refused to consummate the arrangement because of the expense that would be incidental to such an arrangement (R. 187, 188). The Dering Company became impatient and filed a petition before the Interstate Commerce Commission to compel the carrying out of what it insisted was a tentative agreement, which was docketed as Docket No. 10,945, and heard

upon evidence by the Interstate Commerce Commission (R. 188). The cause was submitted October 13, 1920, and decided June 17, 1921. The petition was dismissed and the Commission in its report held:

> "This case, in so far as the question of joint service is concerned, is controlled by the principles announced in Ridge Coal Mining Co. v. M. P. R. R. Co., 62 I. C. C. 259. We there found, in substance, that the service of a mine by a carrier under a trackage agreement is, in practical and legal effect, the substantial equivalent of an extension of its rails to the mine; that the mine which is accorded a joint status by means of a trackage agreement is in the same category as a junction-joint mine, and that, generally speaking, a carrier is not chargeable with undue prejudice because it extends its service to certain mines, either by extensions of its rails or under trackage agreements, thereby giving them the advantages of a joint or junction-point status, while declining to make other extensions or trackage agreements to extend its service to other mines" (Dering Mines Co. et al. v. Director General, Illinois Central Railroad Company et al., 62 I. C. C. 265).

It will be noted that the Commission held that Dering Mine No. 2 was not entitled to Big Four service without the voluntary consent of the latter because it had the service of the Illinois Central and was not located on the Big Four rails. After the Dering Mines case was decided adversely to the contentions of appellee it made an infor-

mal application to appellant to permit a track connection between a private sidetrack which it proposed to build from its mine to connect with the railway of appellant at some point on its line. No officer of the appellant ever agreed to the connection of a track of the kind built (R. 210). After some negotiations there was apparently a tentative suggestion made by appellee to permit such connection within the switching limits of Eldorado. Mr. Worcester, the vice-president of appellant, acting as its general manager, by his letter of October 28, 1921, to Mr. Pauley, the vice-president of appellee, informed the latter that such switching limits extend from a point .3 of a mile north of the freight station in Eldorado to a point 1.3 miles south of the freight station in Eldorado (R. 13). This proposition was not agreed to or acted upon by the appellee, and no such track was built, nor were there any other negotiations prior or subsequent to that date in which any agreement was reached (R. 210).

Abandonment of Effort to Agree—Complicity With Illinois Central and Southern Illinois Railway & Power Company.———This was definitely stated by Mr. Pauley in his testimony. He said: "No positive agreement was ever made that the switch would be built by anybody." The effort to make an agreement concerning the construction of any track was abandoned some time prior to December 22, 1922 (R. 97), when Pauley entered into two contracts for the construction, maintenance and joint operation of the track in controversy by the Illinois Cen-

tral Railroad Company and the Southern Illinois Railway & Power Company. These contracts were separately entered into with the respective parties named, but refer to each other and really constitute a single arrangement. That between the appellee and the Illinois Central provides that the Railroad Company grants to the Coal Company the right to lay down, maintain and operate a single-track railway of standard gauge over and across its waylands and tracks to a point 50 feet west of mile-post No. 118, and to connect said track with the lead track leading out of the Railway Company's main track to the mine of the Coal Company. (Then provides for construction under supervision of engineer, changes to be made, conditions of operation and protection of crossing, etc., and continues) that:

Dering-I. C. Contract.

"5. The Coal Company shall, at its own expense, **procure all right of way required for said track and secure the necessary permission from Government authorities to construct, maintain, operate and use said track, and make proper arrangements with the Southern Illinois Railway & Power Company and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company over which and with which companies' tracks said track to be constructed hereunder is to cross and connect.**"

"6. The Railroad Company agrees after the provisions of Article 5 hereunder shall have been com-

plied with by the Coal Company and the payment to it by the Coal Company of the sum of sixty thousand dollars ($60,000.00), to lay and construct said track and furnish all material needed therefor." (Continuing in relation to details of construction.)

"It is mutually understood and agreed that **in the event the Coal Company is unable to arrange for a physical connection between said track and the tracks of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, or be assured of the transportation service of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company for coal produced at said mine, and comply with the provisions of Article 5,** then there shall be no obligation on the part of said Coal Company to construct or pay for the construction of said track, and all of the **obligations imposed by this contract** on the respective parties hereto **shall be made null and void.**"

"7. The Railroad Company further agrees to maintain said track in suitable condition, furnishing all labor and material required therefor, and the Coal Company agrees, within ten (10) days after receipt of statement, to reimburse the Railroad Company for all expenses actually incurred by the Railroad Company in the maintenance of said track, plus the percentage hereinabove mentioned on labor and material." (Percentage named is 10 per cent.)

"8. It is expressly understood and agreed that the employes of the Railroad Company while engaged in the construction and maintenance of said track and supervision of such work shall, while so engaged, be considered the sole employes of the Coal Company. * * *"

9. (This section relates to liability concerning crossing protection, etc.)

10. (Relates to the payment of bills rendered by the railroad company.)

"11. As a further consideration for the covenants and agreements to be kept and performed by the Railroad Company herein provided the Coal Company does and **hereby grants to the Railroad Company the right to use said track and operate its engines and care thereover, jointly with such other company or companies as may be permitted by the Coal Company to use said track, and also the right to construct spur tracks leading out of said track, but the expense in connection with such spur tracks shall be assumed by the Railroad Company.** The Railroad Company agrees to use said track in such **manner as to not unreasonably interfere with the use to be made of same by any other company or companies.** The Coal Company further grants to the Railroad Company the **right to construct a track connecting with the main track of the Railroad Company, and said track to be constructed by the Coal Company hereunder, but all expense in connection therewith shall be assumed by the Railroad Company.**

"12. This agreement shall **continue in force so long as said track to be constructed hereunder shall be used for the purpose of handling coal from said mine or mines of the Coal Company,** and when said track shall be no longer required for such purpose this contract shall terminate and be of no further force or effect save as to those obligations accruing prior thereto, and the Coal Company shall take up and

remove that portion of said track, including the crossing frogs in the tracks of the Railroad Company, as well as any other property of the Coal Company located upon said waylands, and restore said track and waylands of the Railroad Company substantially to their previous condition. If the Coal Company shall fail to make such removal and restoration within ten (10) days after this contract shall have terminated, the Railroad Company shall have the right, at its option, to remove that portion of said track located upon its waylands, including crossing frogs or any other property of the Coal Company located thereon, and restore its waylands and track substantially to their previous condition, at the risk and expense of the Coal Company.

"13. Upon termination of this agreement, or when said track shall be no longer required by the Coal Company, the **Railroad Company shall have the option of purchasing all of said track indicated in red on the plat hereto attached**, and the Coal Company agrees to sell same to the Railroad Company, if it desires to purchase, at a price to be mutually agreed upon, but in no event shall said price be greater than the actual cost to the Coal Company; and if the Railroad Company does not desire to purchase said track, that portion thereof, including said crossings, located on the waylands of the Railroad Company, shall be removed therefrom as in the next preceding article hereof provided.

"14. **This agreement shall be binding upon the successors and assigns of the parties** hereto, but the Coal Company shall not assign, transfer or underlet to any other company or person any of the privileges herein granted by the Railroad Company, or any

interest in this contract, without the consent of the Railroad Company first having been obtained" (R. 97-103).

The agreement between the Coal Company and the Southern Illinois Railway & Power Company provides:

Dering-Power Co. Contract.

1. The Railway & Power Company agrees to permit a crossing to be installed across its track.

2. The Railway & Power Company grants to the Coal Company and its successors the right to maintain the track across its right of way for a period of 99 years.

"3. Party of the first part" (**the Coal Company**) "hereby **grants and conveys to party of the second part the right to operate locomotives or electric engines, trains and cars over said mine lead track for the purpose of transporting passengers and freight from and to all points of origin and destination on said mine-lead track, or transporting freight and passengers originating and distant from and to points on the connecting line, and the right to construct, on and from said mine-lead track, and over and upon the right of way of said mine-lead track, a wye or other suitable track connection between said mine-lead track and the track of the party of the second part, and agrees to pay to party of the second part one-half of the costs and expense of the installation and construction of such wye or connection promptly upon the completion thereof.**"

"4. Party of the first part also grants and conveys

to party of the second part **the right to construct along, upon and over the right of way of said mine-lead track, or adjacent thereto, as party of the second part may desire, poles and wires for the transmission of electric power to be used in the operation of its said engines, trains and cars; provided, that said poles and wires shall be so constructed as to permit steel locomotive railroad operation upon and over said mine-lead track and as not to unreasonably interfere with the use of said mine-lead track by the party of the first part, its agents, lessees, successors or assigns.** And party of the first part also grants and conveys to the party of the second part the **right to construct along and upon the right of way of said mine-lead track poles and wires for the transmission of electric energy for power and sale purposes**; provided, that the poles and wires so constructed for said last-mentioned use shall be so located as not to interfere with the use of said mine-lead track."

"5. Said party of the second part shall conduct said transportation and railroad operations over said mine-lead track **in such manner as will not unreasonably interfere with the transportation of loaded and empty coal cars to and from the said mine of party of the first part**, or to and from any other mine or industry now or hereafter located on, or adjacent to, said mine-lead track."

"6. As a further consideration for the covenants and agreements to be kept and performed by the party of the first part, the party of the second part agrees that it will, at the request of said party of the first part, **transport empty and loaded coal cars between the mine of party of the first part and the tracks of the Cleveland, Cincinnati, Chicago & St. Louis Rail-**

way Company and charge for such service the usual and customary connecting-line switching rates generally maintained and published by the coal-carrying railroads in the State of Illinois for performing similar service. In performing any service desired by said first party under this section, it is understood that said second party shall act as the agent of the first party in performing said service."

"7. In the event **other industries or mines are served over and by said mine-lead track the cost to party of the first part of constructing and maintaining said mine-lead track shall be apportioned** between party of the first part and such other industries in proportion to the amount of use of said mine-lead track for party of the first part and the use of said mine lead track for such other industry."

"8. Party of the first part shall pay the entire cost and expense of constructing said mine-lead track and the cost thereof over the existing track and the right of way of party of the second part herein granted, and also the additional cost and expense made necessary by said crossing in the installation or construction by party of the second part of additional tracks along and over said crossing."

9. Provides for division of the cost of construction and maintenance of crossing protection.

10. Provides for indemnity of second party.

"11. In the event party of the second part shall use said mine-lead track for transporting engines, trains or cars carrying either passengers or freight, or both, party of the second part will pay to party of the first

part its proportion of the expense of maintaining said track, including the expense incurred by said first party in maintaining, protecting and operating said tracks over the tracks of the Illinois Central Railroad Company, said maintenance expense to be apportioned on the basis of the number of cars of party of the second part passing over said mine-lead track to the total number of cars passing over the same."

"12. It is understood between the parties hereto that the party of the first part has heretofore entered into a contract with the Illinois Central Railroad Company, dated December 22, 1922, concerning the construction, maintenance, operation and use of said track and crossing over the Illinois Central Railroad Company's tracks whereby the Illinois Central Railroad Company is granted certain rights, and the party of the first part has assumed certain liabilities and obligations, copy of which contract is attached hereto and made a part hereof and marked "Exhibit B"; and it is agreed between the parties hereto that the rights granted and conveyed by said first party are subject to the limitations and conditions imposed upon it under the terms and conditions of its said contract with the Illinois Central Railroad Company.

"It is further convenanted and agreed that said second party assume all responsibility for and agrees to indemnify the party of the first part for all loss, damage or liability that said first party may suffer or be required to pay, assumed by and imposed upon said first party under the terms and conditions of its said contract with the Illinois Central Railroad Company, or otherwise, caused by the use and operation of said tracks and crossing by the party of the second part under the grant herein made.

"13. Party of the first part specifically reserves the right to abandon and cease operating said mine lead track at any time, and will, upon so doing, surrender the right of way herein granted, and upon such surrender the rights and obligations of the parties hereunder shall cease and determine; provided, that in event of the termination of said agreement by abandonment and surrender as aforesaid, each party shall have the right, notwithstanding such termination, to recover from the other any obligation or liability which shall have accrued under this agreement while the same was effective and in operation; provided, further, that upon such abandonment, and a failure by party of the second part to purchase as hereinafter provided, party of the first part shall at its expense and at the request of party of the second part, remove said crossing over the track or tracks of party of the second part and restore the track or tracks of the party of the second part to proper operating condition. **And provided, further, that in event the Illinois Central Railroad Company does not desire to purchase said track, as provided in said contract hereto attached**, that sixty days prior to such abandonment party of the first part will give notice thereof in writing to party of the second part and will at the request of party of the second part transfer and convey to party of the second part, by proper instruments of conveyance, said mine lead track and all rights and appurtenances thereunto appertaining and belonging at and for an amount equal to the cost thereof to party of the first part, less such sum as will equal then existing physical depreciation.

"14. It is mutually understood and agreed between the parties hereto that the primary purpose for which said track is being constructed by the Coal Company is to use the same in the shipping of coal produced at said mine over the railroad of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and in event that said Coal Company is unable to arrange for a physical connection between said track and the tracks of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, or to be assured of the transportation service of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, as aforesaid, then there shall be **no obligation on the part of said Coal Company** to construct or operate said track, and all of the obligations imposed by this contract on the respective parties hereto shall be null and void" (R. 104-109).

The purpose and object sought to be attained by the execution of these contracts and the construction of the railway track was fully explained by J. Paul Clayton whose testimony was given in another case and was stipulated into the record in a hearing before the Illinois Commerce Commission. Mr. Clayton fully explained the capacity of the Southern Illinois Railway and Power Company to do business, its desire to make connection with all railroads and extend its business, its connection in Harrisburg with the Illinois Central Railroad and its ambition to operate the track about to be constructed by the Coal Company. His testimony is full of the spirit of his company and the arrangements and prospects sought

to be accomplished by the contracts from which we have quoted (R. 408-418).

Referring directly to the contracts and purposes of his company and the Dering Company, he said:

> "The Dering Coal Company has been before the Commission, and the Commission issued an order to that company to construct a track from the mine of the Dering Coal Company, northwest of Eldorado, across the track of the Southern Illinois Railway and Power Company, and to connect with the tracks of the Big Four. This company has entered into a contract with the Dering Coal Company, which contract is on record with this Commission, for equal user rights on this switch track on equal terms with the Big Four and the I. C. The situation is identical, namely, the cars of the coal company, to get to the Big Four, first cross the line of the Southern Illinois Railway and Power Company, exactly as this crossing. But there the Dering Coal Company was willing and anxious to make 'Y' connection with the Southern Illinois Railway and Power Company, and there the Dering Coal Company did not enter into a contract with the Big Four for any exclusive rights of this switch, **because they have built this track and intend to have it used by whoever may want to use it. They have not parted with their rights** * * *" (R. 412). "That was the petition of the Dering Coal Company, Illinois Central and the Southern Illinois Railway and Power Company. I don't remember the number of that case offhand, but the I. C. Railroad entered no objections similar to these people. It agreed to equal right of user on this switch with themselves on the part of the

Southern Illinois Railway and Power Company. I wish also to make it clear in such an equal right of users the Southern Illinois Railway and Power Company is willing to enter into an equitable contract for apportioning the cost of the 'Y' track, and is willing to itself spend the money for the overhead electric connections, which will not cost anything to the coal company, which will be sufficient clearance for all trains of the railroad company, and also to enter in an agreement regarding the maintenance of this track in proportion to the cars handled over it * * *" (R. 413). "In endeavoring to serve the public with freight and passenger service along its line the company has endeavored to make every connection that every other common carrier does under those circumstances. It has met with encouragement and co-operation with the I. C. Railroad and the L. & N. Railroad, but it has been met always in opposition by the Big Four" (R. 414).

"I don't know that the Big Four is resisting the construction of that track, because we have had no dealings with the Big Four. I testified to that contract with relation to the Dering Coal Company and the Illinois Central, and the three parties, the Dering Coal Company, the Illinois Central and the Southern Illinois Railway and Power Company, were parties to this petition, and I personally signed and knew we had relations with them" (R. 418).

This testimony was the first disclosure to appellants of the purpose and object of the construction of this track, and the proceedings in the case before the Illinois Commerce Commission in Dockets Nos. 12,819 and 12,891, made

a part of the record herein, show that the contracts were not, as stated by Mr. Clayton, placed on record with the Commission, but that these parties joined in petitions and had the orders made to which he refers without notice to the appellant and without giving the Commission any notice of the contracts (R. 325, 331). The orders were subsequently set aside because of want of notice, and the order conferring the right upon the Illinois Central Railroad Company to construct the track was set aside and similar authority granted to the appellee (R. 325).

After the contracts were agreed upon, and before they were executed in writing (R. 356), the Illinois Central Railroad Company, the Southern Illinois Railway and Power Company and appellant did not join in an application to the Illinois Commerce Commission for an order granting permission to the Illinois Central to construct and maintain the track provided for in said contracts across the railways of the Illinois Central and the Power Company, and three intervening public highways, under Docket No. 12,819. The petition was filed November 25, 1922 (Exhibit C, R. 109), the crossings were viewed by an engineer of the Commission November 28, 1922, and an order of the Commission granting authority to the **Illinois Central Railroad Company** to build and maintain said track was entered December 14, 1922. Annexed to the petition was the consents of the Illinois Central and the Power Company to construct said tracks across their railways at grade and the consent of the Highway Commis

sioner of Raleigh Township to cross said highways at grade (R. 111-112). Appellant received no notice of this proceeding, and the order of the Commission was entered ex parte. Among other things granted to the **Illinois Central Railroad Company** was authority in these words:

> "It is further ordered that permission be and the same is hereby granted to the Illinois Central Railroad Company to construct and maintain, or cause to be constructed and maintained, at grade across the single maine track of the Southern Illinois Railway & Power Company, a mine lead track for the purpose of serving the J. K. Dering Coal Company in the operation of its coal mines at a point 3½ miles southeast of Eldorado, near the center of section 36, Raleign Township, Saline County, Illinois, as shown diametrically on a certain blue print dated November 22, 1922, attached to the petition in this case and made a part thereof, and to operate its trains and cars thereover. * * *"

Like authority was granted to the **Illinois Central** to construct and maintain said track across its own railway and three intervening public highways (R. 114, 115). Subsequently a petition was filed by appellee against appellant for an order to connect said track with the railway of appellant at the point of intersection a very short distance south of Wasson Mine No. 1 (R. . . .). Subsequently said cause was set for hearing, and on the hearing thereof it first definitely appeared that authority had been granted to construct and maintain this track under cer-

tain contracts which had been withheld from the Illinois Commission (R. 109, Exhibit C). That the order had been allowed ex parte without giving notice to appellant, and thereupon a motion was made to set aside the order, which was subsequently done, and the two cases were consolidated and heard as one case. The orders were on the 3rd day of May, 1923 (R. 331, 336), granted by the Illinois Commission giving authority to construct the track to appellant substantially as it had theretofore been granted to the Illinois Central Railroad Company and ordering a connection of the track under authority of Section 45 of the Public Utilities Act, which provides as follows:

> "Every railroad company, upon the application of any corporation or person, being a shipper or receiver, or contemplated shipper or receiver, of freight, or of any corporation, person or municipal corporation, owning, operating or controlling any wharf or harbor facilities, for a connection between the railroad of such railroad company and any existing or contemplated track, tracks or railroad of such corporation, person or municipal corporation, shall make such connection and provide such switches and tracks as may be necessary for that purpose and deliver and receive cars thereover: Provided, that such connection is reasonably practicable and can be installed and used without materially increasing the hazard of the operation of the railroad with which such connection is sought, and that the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company.

"Under the conditions specified in the above proviso every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or receiver of freight, shall construct upon its right of way a spur or spurs for the purpose of receiving and delivering freight thereby, and shall receive and deliver freight thereby."

Chap. 111 (a), Par. 60, Cahill's Ill. Stat. 1925.

There was no prayer in either of the petitions filed before the Illinois Commerce Commission for a certificate of public convenience and necessity, nor did either of the orders in those cases grant such a certificate, but it was assumed by counsel for the petitioner that such a certificate was not necessary throughout the hearing. The cases were appealed on the joint record in cases No. 12,819 and No. 12,891 to the Circuit Court of Saline County to contest the validity of the orders (R. R. & Warehouse Com. v. L. & M. R. Co., 267 Ill. 337).

The appeal was perfected and the record filed in the Circuit Court of Saline County July 27, 1923 (R. 418), a copy of notice for a stay order was served September 21, 1923 (R. 420), on September 25, 1923, counsel for appellant would move for an order to stay and suspend the orders of the Commission entered in said cause on May 3, 1923, and May 8, 1923, and presented said motion to the Court, and on October 3, 1923, a stay order was entered by agreement (R. 421); that order continued in force

until the appeal was perfected to the Supreme Court of Illinois under bond approved the 11th day of January, 1924 (R. 422). Nevertheless, the appellant proceeded with the construction of the track prior to the final order of the Circuit Court and at the time the complaint was heard by the Interstate Commerce Commission proof was made that the track had been completed while the stay orders were in effect.

The testimony showed that the laying of the road was done between July 15, 1923, and November 11, 1923, and the track work done between January 1, 1924, and January 9, 1924. The appeal was heard at the April Term of the Supreme Court in 1924. So, it appears that the track was principally constructed in violation of stay orders and the entire work was done after an appeal had been perfected to the Circuit Court of Saline County to test the validity of the orders of Illinois Commerce Commission (R. 289).

Record of the Supreme Court of Illinois Showing Estoppel.———At the final hearing in the District Court a record of the final judgment of the Supreme Court of Illinois reversing the decision of the Illinois Commerce Commission was offered in evidence as matter of estoppel. It shows that all of the contentions of appellee before the Interstate Commerce Commission were decided adversely to it, and also adversely to the decision of that Commission. The petition of the Illinois Central Railroad Company, Southern Illinois Railway & Power Company and

the appellant for authority to build the proposed track in Docket No. 12,819 (R. 452), the answer thereto by appellant (R. 454), a petition to reopen the case and for orders in the consolidated cases, No. 12,819 and No. 12,891 (R. 457), answer thereto (R. 458), the petition for the rehearing on the orders of the Commission (R. 459), amended petition for a rehearing (R. 467), notice of appeal from the order of the Commission (R. 469), the perfecting of the appeal (R. 470), the bill of exceptions filed in the Circuit Court of Saline County (R. 471), the orders of the Illinois Commerce Commission in No. 12,819 and No. 12,891 (R. 471, 472), the assignment of errors in the Supreme Court of the State of Illinois (R. 472), the judgment of the Supreme Court reversing the decision of the Illinois Commission in Dockets Nos. 12,819 and 12,891 (R. 473), show that the same questions that were here under consideration were reviewed by the Supreme Court of Illinois and decided adversely to the contentions of the appellee. There was no appeal from this decision and we contend it must be taken and held by this Court as conclusive and binding against any contention that may be made to the contrary by the appellant in this court. The same questions were presented to the United States District Court on a review of the record in the Interstate Commerce Commission, and we shall insist upon the following errors assigned upon the record.

Assignments of Error Filed June 10, 1926.——And now on this 10th day of June, 1926, came the plaintiff

(appellant), by its solicitors, whose names are subscribed hereto, and says that the decree in said cause is erroneous and against the just rights of the said plaintiff (appellant) for the following reasons:

(1) Because said decree finds the issues against the plaintiff and dismisses the plaintiff's bill.

(2) Because the decree did not find the issues and each of them in favor of the plaintiff and enter a decree in this cause setting aside and holding for naught and declaring void the orders of the Interstate Commerce Commission in cause Docket No. 15,552 entered on February 7, 1925, and all orders entered since that date in said cause, including the order entered on the 1st day of March, A. D. 1926, making effective on May 4, 1926, the order of February 7, 1925.

(3) Because said decree in effect affirms the orders of the Interstate Commerce Commission of February 7, 1925, March 1, 1926, making such orders effective on May 4, 1926.

(4) Because said decree did not find and hold that the track described in the complaint of the J. K. Dering Coal Company to the Interstate Commerce Commission in Docket No. 15,552 is not a spur track within the meaning of paragraph 9, or (G), Section 1, of an Act to Regulate Commerce, approved February 4, 1887, as amended, and that the complainant was not entitled to relief under the provisions of said paragraph, and that the orders of the Interstate Commerce Commission are for that reason void.

(5) Because said decree did not find that the complainant, the J. K. Dering Coal Company, at the time of filing its complaint, was not as to its mine No. 2 as described in the complaint filed with the Interstate Commerce Commission in Docket No. 15,552, a shipper in interstate commerce on the railway of the railway of the plaintiff tendering freight for shipment on said railway, and for that reason the orders of the Interstate Commerce Commission here involved are void.

(6) Because said decree did not find that the evidence in said cause as introduced before and heard by the Interstate Commerce Commission in Docket No. 15,552, failed to establish the material allegations of the complaint as required by paragraph 9 or (G), section 1 of an Act to Regulate Commerce, approved February 4, 1887, and acts amendatory and supplemental thereof, to entitle the complainant, the J. K. Dering Coal Company, to the relief prayed by said petition, and for that reason the orders of the Interstate Commerce Commission here involved are void.

(7) Because said decree did not find that the evidence before the Interstate Commerce Commission failed to show that the J. K. Dering Coal Company was a shipper tendering interstate traffic for transportation upon the railway of the plaintiff on a private sidetrack which had been lawfully constructed to connect with the railway of the plaintiff; that such connection was reasonably practicable and could be put in with safety,

would furnish sufficient business to justify the construction and maintenance of the same, and that for said reason the orders of the Interstate Commerce Commission here involved are void.

(8) Because said decree did not find that the proposed track described in the complaint filed by the J. K. Dering Coal Company and by the testimony of witnesses in case, Docket No. 15,552, lately pending before the Interstate Commerce Commission, was not a lateral or branch line of railroad, or a private sidetrack within the meaning of paragraph 9 or (G), section 1 of an Act to Regulate Commerce, approved February 4, 1887, as amended and supplemented, and for that reason the orders of the Interstate Commerce Commission here involved are void.

(9) Because said decree in effect erroneously finds and holds that the proposed track described in the complaint and by the evidence in case Docket No. 15,552, lately pending before the Interstate Commerce Commission, is a private sidetrack of a shipper tendering interstate traffic for transportation within the meaning of paragraph 9 or (G), section 1 of an Act to Regulate Commerce, approved February 4, 1887, and acts amendatory and supplementary thereof contrary to both the law and the undisputed testimony in said cause.

(10) Because said decree did not find from the evidence (record):

(1) That the purposes and objects of the construction of the track described by the complaint and the

evidence in case, Docket No. 15,552, lately pending before the Interstate Commerce Commission, and the proposed connection thereof with the railway of plaintiff was and is—

(a) To enable the Southern Illinois Railway & Power Company and the Illinois Central Railroad Company to invade the coal territory located upon the railway of plaintiff;

(b) To take from plaintiff the transportation of coal produced upon and along its railway; and

(c) To compel plaintiff in legal and economic effect to extend its railway about three miles into new territory and take coal for transportation off (from) the railway of the Illinois Central (Railroad Company);

(2) That service to the J. K. Dering Coal Company was a mere incident to the general plan and scheme of the J. K. Dering Coal Company, the Illinois Central Railroad Company and the Southern Illinois Railway and Power Company to take (withdraw) coal traffic from the railway of plaintiff; and

(3) That said track, when connected, would be a connecting railway between the railway of plaintiff and the railways of the Illinois Central Railroad Company and of the Southern Illinois Railway and Power Company, constructed without a certificate of public convenience and necessity from the Interstate Commerce Commission, in violation of paragraphs 18 to 22, inclusive, section 402, of the Transportation Act, 1920;

and the said orders of the Interstate Commerce Commission are, for the reasons aforesaid, void.

(11) Because said decree did not find that the track constructed by the Illinois Central Railroad Company for and in connection with the J. K. Dering Coal Company constitutes a new connecting railway and is an invasion of the transportation territory of the plaintiff in violation of paragraphs 18-22 of section 402 of the Transportation Act as contained in 1920 Supplement, Federal Stat. Ann., pp. 98-99, without a certificate of public convenience and necessity and is for that reason void.

(12) * * *

(13) Because said decree did not find that, if the track described in the complaint and by the evidence heard in Docket No. 15,552, lately pending before the Interstate Commerce Commission, be held as an industrial or spur-track for the use of the J. K. Dering Coal Company, its construction, maintenance and operation would be within the jurisdiction of the Illinois Commerce Commission and Illinois courts, and if it be held as a connecting track between the railway of the Illinois Central Railroad Company and the railway of the plaintiff, or as a track in extension of either the railway of the Illinois Central Railroad, or the railway of the plaintiff, it would be within the jurisdiction of the Interstate Commerce Commission and the federal courts and would in that event be controlled by paragraphs 18-22 of section 402 of the Transportation Act, and could not be constructed, maintained or operated without first obtaining a certificate of public convenience and necessity from the Interstate Commerce Commission; that in either event said track,

as constructed and proposed to be maintained and operated, is an unlawful track built contrary to either the laws of the State of Illinois, or the laws of the United States, and that in ordering a connection therewith the Interstate Commerce Commission exceeded its power, jurisdiction and authority and that the orders of the Commission are, therefore, void.

(14) Because the said decree did not hold and find that paragraphs 18-22, of section 402 of the Transportation Act have so amended and modified paragraph 9, or (G), of section 1, of an Act to Regulate Commerce, approved February 4, 1887, that the Interstate Commerce Commission has no jurisdiction to order a connection between an industrial or spur-track constructed to serve an industry and the railway of an interstate carrier, though said track be useful and used in the transportation of both interstate and intrastate commerce, and no jurisdiction to require such a track or such a connection to be maintained, used or operated in interstate commerce, and for that reason the orders of the Interstate Commerce Commission here involved are void.

(15) Because said decree in effect holds that the construction and maintenance of the track with which the connection was sought in the proceedings in Docket No. 15,552, is not within the jurisiction of the Interstate Commerce Commission, yet holds that the connection between said track and the railway of the plaintiff is within the jurisdiction of the Interstate Commerce Commission, not-

withstanding the provisions of paragraphs 18-22, section 402, of the Transportation Act.

(16) Because said decree did not hold and find that if the track with which a connection was sought by the proceedings in Docket No. 15,552, lately pending before the Interstate Commerce Commission, is not a private sidetrack, then it was not such a track as is described by the complaint in said cause and would not be within the description of a track within the terms and language of said paragraph 9, or (G), of section 1 of an Act to Regulate Commerce, approved February 4, 1887, and the order of the Commission requiring connection therewith is void.

(17) Because said decree did not find and hold that the finding and orders of the Interstate Commerce Commission to the effect that the track with which the connection was sought is a private sidetrack within the meaning of paragraph 9, or (G), of section 1, of an Act to Regulate Commerce, approved February 4, 1887, is contrary to the facts established by the undisputed evidence contained in the record, and, therefore, the order of the Interstate Commerce Commission so holding and finding is void.

(18) Because said decree does not hold:

(1) That the power, jurisdiction and authority of the Interstate Commerce Commission and the federal courts over the construction, maintenance and operation of a connection with the proposed track is controlled by the proviso in Paragraph 22, Section 402 of the Transportation Act in relation to spur, industrial, team, switching

and sidetracks located, or to be located, wholly within a single state;

(2) That the adjudication of the Illinois Commerce Commission orders in the courts of Illinois, in Illinois docket Nos. 12,819 and 12,891, by the courts of Illinois, was and is final and conclusive upon the Interstate Commerce Commission and the federal courts, (a) as an estoppel (b) by force of Section 1 of Article IV of the Constitution of the United States, which provides, "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state"; (c) and, that the construction and application of Paragraph 22 of Section 402 of the Transportation Act, and Section 45 of the Illinois Public Utilities Act, which provides:

> "Every railroad company upon the application of any corporation or person, being a shipper or receiver, or contemplated shipper or receiver of freight, shall make such connection and provide such switches and tracks as may be necessary for that purpose and deliver and receive cars thereover: Provided, that such connection is reasonably practicable and can be installed and used without materially increasing the hazard to the operation of the railroad with which such connection is sought, and the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company."

by the Illinois Supreme Court are binding as a precedent upon the courts of the United States.

(19) Because said decree did not find that the adjudication of the right of the J. K. Dering Coal Company to a track connection between the track described in the complaint in Docket No. 15,552, and of the facts involved in an effort to compel such a connection under Sections 45 and 46 of the Public Utilities Act of Illinois, in the courts of Illinois, is conclusive as an estoppel upon the J. K. Dering Coal Company and the United States as its representative in this proceeding to allege, claim or prove to the contrary of such adjudication and the findings of fact therein, either before the Interstate Commerce Commission or the courts of the United States, and for that reason the orders of the Interstate Commerce Commission in said cause are void.

(20) Because said decree does not find that the Interstate Commerce Commission failed to make sufficient findings of fact in case, Docket No. 15,552, as a basis for the orders of said Commission entered therein, and that for that reason the said orders are null, void and of no effect.

(21) Because said decree did not find that the Interstate Commerce Commission neglected and refused to make findings of fact upon all of the material issues presented by the complaint and answer thereto in case, Docket No. 15,552, namely, upon the issues:

(a) Whether said track was constructed for the purpose of enabling the Illinois Central Railroad and the

Southern Illinois Railway & Power Company to invade the coal transportation field then occupied by the plaintiff.

(b) Whether the construction of said track was reasonably necessary to enable the J. K. Dering Coal Company to reach the coal markets to which coal produced at its mine No. 2 might be shipped in interstate commerce.

(c) Whether the existing track connection between the Illinois Central and the railway of the plaintiff was or was not a sufficient and adequate outlet to the railway of the plaintiff from the J. K. Dering Coal Company mine No. 2, to the markets available to be reached over the railway of the plaintiff.

(d) Whether, on the whole, the construction of such track would result in a net revenue to the plaintiff sufficient to justify the construction, maintenance and operation of the track connection ordered, and that for the failure of the Interstate Commerce Commission to make findings upon these issues its order is null, void and of no effect.

I.

SUMMARY OF FACTS AND LAW PRESENTED IN ARGUMENT.

(We shall here attempt a complete summary of material and controlling facts relating directly to points which we shall present in argument and follow the same with a brief of the law aplicable thereto.)

(1) **Appellant's Investment and Facilities.**——In 1905 the coal development in Saline County had progressed to a point where there was urgent need of transportation facilities. Appellant had no railway capable of meeting this demand, nor did any other railroad located in Saline County have adequate facilities. The first and most of subsequent development came adjacent to appellant's railway. Appellant made an investment, commencing in 1905, of twenty million dollars to meet that demand, and in anticipation of the development that has since occurred established good facilities to handle and transport such coal as has been produced upon its railway (R. 313-315). At the time the petitions were filed before the Illinois Commission and the Interstate Commerce Commission in this case the maximum capacity of these facilities at the point of the proposed connection had been reached (R. 296, 298). On appellant's railway are twenty three mines (R. 293), served by thirteen switch en-

gines, moving from 275 to 280 loads over the double tracks of appellant between Harrisburg and Eldorado daily and a volume in January, 1925, of 12,483 cars, or 47 trains (R. 238-240, 404). This is appellant's only profitable source of revenue (R. 313). The evidence shows that the success and permanency of this railway economically depends upon its coal traffic. The contracts in evidence and the testimony to which we have drawn attention, we contend, establish that the proposed invasion of its field is in conflict with the settled policy both of the federal and state law regulating railways by which railway companies are given a regulated monopoly of business built up by them and originating on their lines.

(2) **Incompetency of Appellee to Build Track.**——Appellee is a private business corporation, without charter authority to build, own, lease or operate a public railway or any railway which the public would have the lawful right to use (Pauley, R. 182, 353, 207).

(3) **The Evidence Shows That Appellee Is Not a Shipper on the Railway of Appellant.**——Its coal properties at the nearest point of approach are a half mile from appellant's right of way (R. 208). Its plant is located on the railway of the Illinois Central and its mining property extends on both sides of the main track of that company (Plats, R. 33; 424 fol. No. 423). All coal mined at the mine of appellee has been transported to market over the Illinois Central Railway, either to destination or to

connections, and delivered to other railways to be transported to destination. General Manager Pauley testified: "I cannot say whether we ever actually tendered any coal via such routing" (over the Eldorado connection with appellant) "or not." Eighty per cent of the coal mined at Dering mine No. 2 goes direct to Chicago (R. 368). Appellee's mining plant was erected in 1917 after the passage of the Illinois Public Utilities Act, which prohibits it from building a track from its mining plant to the railway of appellant because three highways and two railways intervene, so its location isolates it from being in fact or becoming a shipper on the railway of appellant. There is nothing shown by the evidence to distinguissh appellee as a shipper on the railway of appellee from any other mine owner with a plant located on any other railroad than that of appellant in the State of Illinois except distance, and the distance from appellee's plant to appellant's railway by the rails of the Illinois Central and by appellee's new track are practically the same, and we insist that the question is of principle and not distance.

(4) **The Track Appellant Has Connected With the Main Track of Its Railway by a Compelling Order of the Interstate Commission Is Shown by the Evidence Not to Be a Sidetrack Within the Meaning of Paragraph 9, Section 1 of the Interstate Commerce Act.**——This track is 2.9 miles in length (R. 285), is laid at grade across three pub-

lic highways and two public railways and is directly connected with the main track of the appellant under the order of the Interstate Commerce Commission and through a mine switch with the main track of the Illinois Central Railroad Company, both of which are public interstate and intrastate railways (R. 192, 193, 285). Over this track cars loaded and empty might be freely moved from the main track of appellant's railway to the main track of the railway of the Illinois Central Railroad Company and vice versa. It is so located and situated with private lands adjoining it on each side that other industries might be located upon it and spurs might be extended from it into the coal fields east and west of it. (See contracts quoted and R. 322, Map 339B.) It could be readily connected with the mine tracks of the Wasson mine No. 1, a half mile north of the connection with the railway of appellant (R. 208), and was built for that purpose (R. 219). It can be easily connected with the railway of the Southern Illinois Railway & Power Company at the connection, and that would extend it to all of the mines of appellant's railway (twenty-three in number), between Carrier Mills and Eldorado, and such connection and use is intended. (See contracts quoted.) Mr. Pauley expressly so testified (R. 381-382). It extends from an industry on another naturally competing railway to the railway of appellant, which industry (Dering Mine No. 2) is but 2.5 miles from the connection with the main track of appellant and its switch yards in Eldorado jointly used

by the Illinois Central (R. 367). It was built under contracts which give the Illinois Central and the Power Company the right to operate and use it perpetually, if option to acquire it be exercised, and until it shall be discontinued, at all event, to serve industries erected on it and to extend spurs from it and serve industries on such spurs or transport freight brought to it by either the Illinois Central or the Power Company destined to points on the other. One of the considerations to the Illinois Central is that it should have access to Wasson mine No. 1 (R. 219, 381, 382). It is provided by contracts that cars transported between Dering mine No. 2 and appellant's railway shall be subject to charge by the Power Company for such service at connecting line switching rates, and that both companies may operate the track under a track agreement held by the courts of Illinois to be a lease. It is denominated a "sidetrack" in the complaint (R. 85, Par. 4), and the language of paragraph 9, Section 1 of the Interstate Commerce Act, upon which the complaint was based, is "sidetrack," but the track construction bears no resemblance to a sidetrack in location, appearance, physical construction or the uses which it is intended to serve, or the manner in which it is to be operated. Photographic exhibits (399, 409) show this track to be of main-track construction, and Mr. Pauley testified that the track is to be equal to the main track of appellant and the Illinois Central (R. 355). It also appears from the testimony of appellee's engineers that it is in construction a first-class main track with

eighty-five-pound rail (R. 225, 233). We, therefore, contend that it is not a "sidetrack," and the Interstate Commerce Commission had no evidence before it to justify it in impliedly holding that it is a "sidetrack" by granting relief under the provisions of paragraph 9 of Section 1 of the Interstate Commerce Act.

(5) **The Track Is a Connecting Railway and an Extension of Railways.**——The facts we have just exhibited to establish that the location, situation, use and operation of this track are such that it is not in fact a sidetrack established affirmatively as a matter of fact, that it is a public railroad intended to be used by all persons having or hereafter establishing industries along its line or connected with it by spurs and is as related to existing railways with which it now or shall hereafter be connected in pursuance of the contracts under which it was built, an extension of their railways and separately considered as a distinct entity as a connecting railway to be operated under contracts which amount to a lease for the transportation of coal produced on the railway of the Illinois Central to the railway of appellant and vice versa, and all such traffic as the Illinois Central and the Power Company may find occasion to transport over it.

(6) **No Physical or Economic Fact Was Proven Which Could Have Induced the Interstate Commerce Commission to Order a Connection Between the Railway of Appellant and the Track of Appellee for the Purpose of Giving the Appellee a Status on Appellant's Railway.**——The dis-

tance to the Eldorado connection is but 2.5 miles; the adequacy of that connection and appellant's yards at Eldorado to receive and transport all there delivered from appellee's mine was established by the evidence and not questioned (R. 300). The Illinois Central has the largest number of local consuming markets for coal located on it, reaches the largest number of distributing markets, and has the greatest number of connections with other railways to remote points and populous centers (Exhibit XXXII, 432-434, and map following). No effort was made by appellee to get joint routes and rates from its mine (R. 207, 208), and its vice-president testified that he did not know of a shipment ever being offered over the Eldorado connection that was refused (R. 207, 208, 217).

(7) **Evidence Not Sufficient to Warrant the Order of the Interstate Commerce Commission Either Upon the Theory That the Track Is a Sidetrack or a Connecting Railway and an Extension of Railways.**——The evidence shows either one or two ultimate facts, that the track in question is either a sidetrack within the meaning of Par. 22, of Sec. 1, of the Interstate Commerce Act, or a connecting railway and an extension of railways within the meaning of pars. 18 to 21, of section 1 of that act. In the former case there was no proof that there was authority granted by the Illinois Commerce Commission to construct it as required by Sec. 45 of the Illinois Public Utilities Act. In

the latter there was no proof that a certificate of public convenience and necessity had been granted by the Interstate Commerce Commission, nor was there any evidence offered under which such a certificate could lawfully be granted.

(8) **Evidence Tending to Prove Service of the Illinois Central Inadequate and Appellee's Economic Need of Wider Market Immaterial.**——The complaint, in addition to stating the elements necessary to bring it within the provisions of paragraph 9, Section 1 of the Interstate Commerce Act, stated the economic needs of the complainant. The Examiner of the Commission, in opening the case for hearing, said:

> "In this complaint complainant asks that the defendant be required to cease and desist from violating the act and to construct, maintain and operate, on its own right of way, * * * a switch connection with the track of complainant under such reasonable terms and conditions as found justifiable, and to permit and to be permitted to accept coal tendered and delivered over this connection and to furnish cars for the movement to the best of its ability, without discrimination" (R. 180).

Counsel for appellant made substantially this statement: (1) That the statement made by the director is not a statement of the issues; (2) the real issue in this case is one not of service but of power and authority (a) of the

Dering Coal Company to own and control a railroad track which furnishes a connecting railway track which completes a connecting railway between two operating railroads; (b) whether the Dering Coal Company, located 2½ miles distant on the Illinois Central from a connection on that railroad with appellant, so that deliveries could be made from the Dering mines to the Big Four without the proposed track, is in a position to claim that it is an industry on the railway of appellant, entitled to the benefit of paragraph 9 of Section 1 of the Interstate Commerce Act; (c) whether the scheme devised by the Dering Company, through contracts entered into between it and the Illinois Central Railroad Company and it and the Southern Illinois Railway & Power Company to extend their rails through the construction of this connection, and, in pursuance of those contracts, for the operation of passenger and freight trains over said track and for the purpose of transporting coal from the Illinois Central to the Big Four and from Wasson Mine No. 1 on the Big Four to the Illinois Central, is not prohibited by the Illinois law requiring a certificate of convenience and necessity and the Interstate Commerce law requiring a certificate of convenience and necessity (R. 180, 181). After a statement of the issues the Examiner allowed the evidence to take a wide range in relation to the economic need of the appellee for a wider range of markets for its coal, and the physical reasons why the Illinois Central did not give

it better service, and the history of the operations of the Dering mine as compared with other mines in the Saline County district, all of which are totally irrelevant to any issue properly raised by either the complaint or the answer. This evidence, we insist, was all immaterial and quite aside from the questions involved, according to the contentions of the officers of the complainant. The thing appellee really wanted, according to the testimony of its vice president, was to indirectly get the benefit of being an industry on the railway of appellant without in fact being located upon its rails, the equivalent of a reciprocal switching arrangement.

II.

BRIEF OF ARGUMENT.

A Definite Statement of Points on Which Appellant Will Rely (R. 482).

The order and judgment of the District Court dismissing the complainant's bill should be reversed and the orders of the Interstate Commerce Commission should be set aside and held for naught:

(1) Because Paragraph G (or 9) of Section 1 of the Interstate Commerce Act was modified by Paragraphs 18 to 22 of Section 402 of the Transportation Act and a new policy established by which side, spur and industrial tracks (wholly within a single state), were completely excluded from the jurisdiction of the Interstate Commerce Commission and committed to the jurisdiction of the several states, and if the track in controversy is a sidetrack within the meaning of said paragraph G (or 9) the Interstate Commerce Commission had no jurisdiction to require its connection, maintenance or disconnection, and if not, no jurisdiction was conferred by the petition or complaint filed herein.

(2) Under the settled law and the facts of the record with all allowable inference in support thereof no case

is established by the evidence contained in the record for these reasons:

(a) The complainant was not a shipper on defendant's railway;

(b) The track is not a private sidetrack as alleged, but a connecting railway.

(3) The findings of the Commission are predicated upon immaterial facts, and the Commission omitted to make findings upon material issues presented by the pleadings and evidence.

(4) The record shows that the J. K. Dering Coal Company first elected to proceed under a similar statute of the State of Illinois to obtain a connection between the track here involved and the railway of appellant and relied upon substantially the same facts as are here involved. An adjudication of the issues in that case, therefore, is conclusive of the issues of material fact adjudicated as between the appellant and the Dering Coal Company in this proceeding as to the status, relations of the parties and the application of the laws of Illinois thereto, and the J. K. Dering Coal Company was in law estopped to proceed upon the same matter before the Interstate Commerce Commission, and, therefore, its petition should have been dismissed.

A.

THE INTERSTATE COMMERCE COMMISSION RIGHTLY HELD THAT IT HAD NO CONTROL OVER THE CONSTRUCTION OR ABANDONMENT OF A PRIVATE SIDETRACK LOCATED WHOLLY WITHIN A STATE, BUT WRONGFULLY THAT IT WAS NOT BOUND BY THE DECISION OF THE SUPREME COURT OF ILLINOIS CONSTRUING THE CONSTITUTION, STATUTES AND CONTRACTS UNDER WHICH SUCH TRACK WAS CONSTRUCTED TO DETERMINE WHETHER IT IS A PUBLIC OR A PRIVATE TRACK.

(a) Paragraph 22 of Section 1 of the Interstate Commerce Act provides:

> "The authority of the Commission conferred by paragraphs 18 to 21, both inclusive, shall not extend to the construction, abandonment of spur, industrial, team, switching or *sidetracks* located, or to be located, wholly within one state."
>
> 3 Mason's U. S. Code Annt., Title 49, p. 3489, Sec. 1, Par. 22.

(b) The Supreme Court of the United States, in construing this section, said:

> "It seems to be the contention of the company that since 85 per cent of the business done on the sidetrack is interstate commerce, the power to order its establishment or abandonment is vested in the Interstate Commerce Commission and that the state commission is without authority in the premises. *Such a claim is in the teeth of the Transportation Act of February 28, 1920, 41 Stat. at L. 456; Chap. 91, Sec. 402, Par. 22, Comp. Stat., Sec. 8563; Fed. Stat. Anno., Supp. 1920,*

p. 96, which provides that the authority of the Commission conferred by section 402 over the extension or abandonment of interstate railway lines shall not extend to the construction of spur, industrial or sidetracks. (See Railroad Commission v. Southern P. Co., 264 U. S. 331, 345, 68 L. ed. 713, 718, 44 Sup. Ct. Rep. 376.)

Western & Atlantic R. Co. v. Georgia Public Service Commission, 267 U. S. 497, 69 L. ed. 756.

(d) That a connection may be ordered under Paragraph 9 of Section 1 of the Interstate Commerce Act, and the complaint filed before the Interstate Commerce Commission by appellee, it must be a "private sidetrack." Abridged to express the scope covered by the complaint before the Interstate Commerce Commission, Paragraph 9 of Section 1 of the Interstate Commerce Act would read as follows:

> "Any common carrier subject to the provisions of this chapter (Title 49—Transportation), upon application of * * * any shipper tendering interstate traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection with any such * * * 'private sidetrack' which may be constructed to connect with its railroad."

(e) Whether the track connected under the order of the Commission was in law a public or a private track was involved in the decision and order of the Interstate Com-

merce Commission and should have been controlled by the decision of the Supreme Court of Illinois construing the Constitution and laws of the state, not necessarily as to this particular track, but as to a track of its kind, as shown by evidence uncontroverted. As to whether public or private:

> "The highest court of the State of Alabama has given a construction to the act of the Legislature chartering this company, which we have seen is fatal to a recovery. It belongs to the state courts to expound their own statutes; and when thus expounded the decision is the rule of this Court in all cases depending upon the local laws of the state (7 Wheat. 361; 6 Peters 291)."

Smith v. Mernochen, 7 Howard 219, 13 L. ed. 675.

> "The federal courts are bound but follow the decisions of the highest courts of the state upon questions relating to the construction of the state Constitution and the validity thereunder of the state statutes, and where a state statute has been construed by the highest judicial tribunal of the state such construction is regarded as a part of the statute and is binding upon the federal courts as the text of the statute itself."

25 C. J., Sec. 171, p. 832.

(f) The words "shipper," "lateral branch line" and "private sidetrack" in Paragraph 9, Section 1 of the Interstate Commerce Act do not relate to what the structure

may become, but to what it must be at the time the complaint is filed.

"The words 'lateral branch line' do not refer to what the applicant may become or be by the order of the Commission, but to what it already is when it applies."

United States v. B. & O. S. W., 236 U. S. 18, 57 L. ed. 106.

B

THE PURPOSE OF ENACTING PARAGRAPHS 18 TO 22 OF SECTION 1 OF THE INTERSTATE COMMERCE ACT WAS TO PREVENT THE WASTEFUL CONSTRUCTION OF RAILWAYS AND THE EXTENSION OF RAILWAYS INTO NEW TERRITORY WHEN NOT NEEDED TO GIVE SERVICE TO THE PUBLIC AND WASTEFUL COMPETITION, AND ALTHOUGH A PARTICULAR CONSTRUCTION MAY HAVE MANY OF THE INDICIA OF A PRIVATE SIDE OR SPUR TRACK, IF IT IS BUILT INTO NEW TERRITORY ALREADY SERVED BY ANOTHER CARRIER AS A MEANS OF COMPETITION, IT IS WITHIN THE PROHIBITION OF THESE PROVISIONS.

(a) Though Owned by the Dering Company This Is a Track of the Illinois Central Railroad Company.——The nominal ownership of the track is immaterial.

"It has been frequently held by this Court that a railroad track, though used in connection with an industry on the line of the railway, is, as between the public and the railway company, a part of the railway, whether constructed by the railway company or the owner of the industry. In *Truesdale v. Peoria Grape Sugar Co.*, 101 Ill. 561, a bill was filed seeking to enjoin the laying of a railroad track upon the streets of the City of Peoria on the ground that it

was for a private use only, and that the streets of the city could not be used for private purposes. It was there said: 'The track defendant was authorized by ordinance to construct, when completed and attached to the principal track, is as much a "public highway," in the sense that term is used in the Constitution, as is the road of the company to which it is attached. * * * This track was laid, in a public street, under an ordinance of the city granting the privilege.' "

St. Louis, Springfield & Peoria R. R. v. Commerce Commission, 309 Ill. 621, at 625.

(b) After discussing whether a proposed spur track from the Missouri Pacific Railroad to a mine located on the railway of the Marion & Eastern Railroad Company was a side, spur or industrial track according to the facts, which were that the Missouri Pacific was merely extending the spur from its main track to a coal mine for the purpose of dividing the business of the coal mine and obtaining a share thereof for transportation, the Supreme Court of Illinois in a case subsequently approved by the Supreme Court of the United States in refusing to take it on a writ of certiorari said:

"Ordinarily, spur or industrial tracks are those which are used for the loading, reloading, storing and switching of cars and other services merely incidental to the regular train haul." (Citing a number of cases.)

(c) The Court then specified the determining factor as being that the Missouri Pacific Company was attempting to encroach upon a transportation territory occupied by the Marion and Eastern. It was said:

> "The new track, if built, will enter territory served by appellant, to and from which through routes and rates exist. While the answer avers that on the proposed track no line-haul rates will be established, nor regular continuous movements of trains made, nor a station erected, nor the billing of freight required, except through existing facilities, the effect of the construction of that track will be to afford railroad service in direct competition with appellant's road, on which, in connection with other railroads, through routes and rates have been established. The track, if laid, will be used in interstate as well as intrastate commerce. * * *
>
> "One of the reasons for the enactment of paragraph 18, above quoted, is to prevent the building of duplicate lines of railroad where an additional line will not serve the present or future public convenience and necessity but will add to the burden of maintenance, which the public will be required to pay (Detroit and Mackinaw Railway Co. v. Boyne City, G. & A. Railroad Co., supra.). Congress has expressly prohibited railroad companies subject to the Interstate Commerce Act from extending their lines without the consent of the Interstate Commerce Commission."
>
> Marion & Eastern R. R. Co. v. M. P. R. R. Co., 318 Ill. 436, at 443.

Missouri Pacific Railroad Company v. Marion & Eastern Railroad Company (No. 1009), Petition for Writ of Certiorari denied, citing 315 Ill. 477; 271 U. S. 661, 70 L. ed. 1137.

(d) On March 1, 1926, the Supreme Court of the United States definitely held the same as the Supreme Court of Illinois:

> "A truer guide to the meaning of the term 'extension and industrial track,' as used in Pars. 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act 1920. By that measure Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity and conservation of the financial resources of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival it may be the public which ultimately bears the loss. (See Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 66 L. Ed. 371, 22 A. L. R. 1086, 42 Sup. Ct. Rep. 232; New England Divisions Case [Akron, C. & Y. R. Co. v. United States], 261 U. S. 184, 67 L. Ed. 605, 43 Sup. Ct. Rep. 270; Chicago Junction Case [Baltimore & O. R. Co. v. United

States], 264 U. S. 258, 68 L. Ed. 667, 44 Sup. Ct. Rep. 317; Railroad Commission v. Southern P. Co., 264 U. S. 331, 68 L. Ed. 713, 44 Sup. Ct. Rep. 376.) The act sought, among other things, to avert such losses."

Texas & P. R. Co. v. Gulf, C. & S. F. R. Co., 270 U. S. 266, at 277, 70 L. Ed. 583.

(e) Referring to a similar statute enacted in Illinois prior to the enactment of Paragraphs 18 to 21 of the Interstate Commerce Act, the Supreme Court of Illinois, pointing out the method of relief from complaints such as those made by appellee, said:

"The statute (the Public Utilities Act) provides the means of compelling the existing transportation system to provide adequate service for the public. If the people living in the territory through which the Aurora, Elgin and Chicago Railroad operates are not being properly served they can file a complaint with the Commerce Commission, which has the power to order whatever change or increase in service the evidence warrants. If the existing transportation company does not comply with the Commission's order, then a situation may arise where the public convenience and necessity will require the establishment of another system. The theory of the Public Utilities Act is to provide the public with efficient service at a reasonable rate by compelling an established carrier occupying a given field to provide adequate service and at the same time to protect the existing utility from ruinous competition

(West Suburban Transportation Co. v. Chicago and West Towns Railway Co., ante, p. 87, 309 Ill.). By this method the public is protected from paying the cost of the operation of competing systems and a return upon double the investment of capital."

Choate v. Commission, 309 Ill. 256.

C.

APPELLEE IS A PRIVATE CORPORATION OF ILLINOIS WITHOUT CHARTER POWER TO BUILD, OWN, LEASE, MAINTAIN OR OPERATE A RAILROAD AND IS PROHIBITED BY SECTIONS 55 AND 58 OF THE ILLINOIS PUBLIC UTILITIES LAW FROM LAYING A PRIVATE RAILROAD TRACK ACROSS A PUBLIC HIGHWAY, OR A PUBLIC RAILWAY.

(a) A private corporation is not within the provisions of the Public Utilities Act; it only confers power to be exercised by public utilities and the appellee is not a public utility.

"A coal corporation is not a public utility" (Public Utilities Act, Sec. 10), "but is a private enterprise. It possesses no charter powers to build a railroad."

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. Commerce Commission, 315 Ill. 477.

(b) Section 10 of the Public Utilities Act, among other things, provides:

"The term 'public utility,' when used in this act, means and includes every corporation, company, as-

sociation, joint stock company or association, firm, partnership or individual, their lessees, trustees or receivers appointed by any court whatsoever (except, however, such public utilities as are or may hereafter be owned or operated by any transportation district or other municipality, and except such telephone company or companies which are or may hereafter be purely concerns having no rates or charges for services, but paying the operating expenses by assessment upon the members of such company or companies and no other person or persons) that now or hereafter:

"(a) May own, control, operate or manage, within the state, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with the transportation of persons or property or the transmission of telegraph or telephone messages between points within this state; or for the production, storage, transmission, sale, delivery or furnishing of heat, cold, light, power, electricity or water; or for the conveyance of oil or gas by pipe line; or for the storage or warehousing of grain; or for the conduct of the business of a wharfinger; or that

"(b) May own or control any franchise, license, permit or right to engage in any such business.

"The term 'common carrier,' when used in this act, includes all railroads, street railroads, express companies, private car lines, sleeping car companies, fast freight lines, steamboat lines and other common carriers by water, and every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees or receivers appointed by any court whatsoever, owning,

operating or managing any such agency for public use in the transportation of persons or property within the state."

1925 Cahill's Ill. Stat., Chap. 111a, Sec. 10, p. 1891.

(c) Section 55 of the Public Utilities Act, conferring authority upon railroads to construct a new track across a public highway, prohibits its doing so without a certificate of public convenience and necessity. Section 55 of said act, among other things, provides:

"No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction.

"No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this state and not possessing a certificate of public convenience and necessity from the State Public Utilities Commission or the Public Utilities Commission, at the time this act goes into effect, shall transact any business in this state until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

"Whenever after a hearing the Commission determines that any new construction or the transaction

of any business by a public utility will promote the public convenience and is necessary thereto it shall have the power to issue certificates of public convenience and necessity.

"Such certificates may be altered or modified by the Commission, upon its own motion or upon application by the person or corporation affected. Unless exercised within a period of two years from the grant thereof authority conferred by a certificate of convenience and necessity issued by the Commission shall be null and void.

"No certificate of public convenience and necessity shall be construed as granting a monopoly or an exclusive privilege, immunity or franchise."

1925 Cahill's Ill. Stat., Chap. 111a, Sec. 55, p. 1902.

(d) And a private corporation cannot build such a track for its use.

C. C. C. & St. L. Ry. Co. v. Ill. Comr. Com., 315 Ill. 461, at 474;
St. L. Springfield & Peoria R. v. Ill. Comr. Com., 309 Ill. 625.

(e) The Public Utilities Act of Illinois expressly prohibits the laying of any railroad track across a public highway without the consent of the Public Utilities Commission and confers no power to authorize the laying of such a track by a private corporation.

Section 58 provides:

"No public road, highway or street shall hereafter be constructed across the track of any railroad company at grade, nor shall the track of any railroad company be constructed across a public road, highway or street at grade, nor shall the track of any railroad company be constructed across the track of any other railroad or street railroad company at grade, nor shall the track of a street railroad company be constructed across the track of a railroad company at grade without having first secured the permission of the Commission: *Provided*, that this section shall not apply to the replacement of lawfully existing roads, highways and tracks. The Commission shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe. The Commission shall have power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each such grade crossing."

1925 Cahill's Ill. Stat., Chap. 111a, Sec. 58, p. 1903.

(f) Even a railroad cannot exercise the right of eminent domain for a track not needed as a facility of the railroad for the purpose of extending a track into an industry.

Litchfield & Madison v. Alton & Southern R. Co., 305 Ill. 388, 395.

(g) A track cannot be laid in, upon or across a public highway or a railroad in such way as that it is possible for the public to use it by a corporation having no right to own, use and operate such track for the benefit of the public, and a track so located and connected with a railroad becomes the track of the latter.

Truesdale v. Peoria Grape Sugar Co., 101 Ill. 567;
Chicago Dock Co. v. Garrity, 115 Ill. 55;
McGann v. People, 194 Ill. 526;
Public Utilities Commission v. Smith, 298 Ill. 159;
St. Louis, Springfield & Peoria R. R. v. Illinois Commerce Commission, 309 Ill. 621, at 625.

In the latter case it is said:

"It has been frequently held by this Court that a railroad track, though used in connection with an industry on the line of the railway, is, as between the public and the railway company, a part of the railway, whether constructed by the railway company or the owner of the industry. In Truesdale v. Peoria Grape Sugar Co., 101 Ill. 561, a bill was filed seeking to enjoin the laying of a railroad track upon the streets of the City of Peoria on the ground that it was for a private use, only, and that the streets of the city could not be used for private purposes. It was there said: 'The track defendant was authorized by ordinance to construct, when completed and attached to the principal track, is as much a 'public highway,' in the sense that term is used in the Constitution, as is the road of the company to which

it is attached. * * * This track was laid, or is to be laid, in a public street, under an ordinance of the city granting the privilege."

St. Louis, Springfield & Peoria R. R. v. Commerce Commission, 309 Ill. 621, at 625.

D.

APPELLANT'S TRACK BEING A STRUCTURE OVER WHICH THE INTERSTATE COMMERCE COMMISSION HAS NO JURISDICTION, THE DECISIONS OF THE SUPREME COURT OF ILLINOIS MUST DETERMINE ITS CHARACTER AS PUBLIC OR PRIVATE.

(a) The appellant's track having been constructed under the laws of Illinois by an Illinois corporation, is a public or private track as determined by Illinois law, and being located across public highways and connected with public railways, is a public and not a "private" track.

St. Louis, Springfield & Peoria R. R. v. Illinois Commerce Commission, 309 Ill. 621, at 625;
C. C. C. & St. L. Ry. Co. v. Illinois Commerce Commission, 315 Ill. 461, at 474;
Public Utilities Commission v. Smith, 298 Ill. 159.

E.

APPELLEE IS NOT A SHIPPER ON THE RAILWAY OF APPELLANT WITHIN THE MEANING OF PARAGRAPH 9, SECTION 1, OF THE INTERSTATE COMMERCE LAW.

(a) Paragraph 9 of Section 1 of the Interstate Commerce Law is as follows:

"*Any common carrier subject to the provisions of this chapter*, upon application of any lateral, branch

line of railroad, or of *any shipper tendering interstate traffic for transportation*, shall construct, maintain and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad *or private sidetrack which may be constructed to connect with its railroad*, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper."

3 Mason's U. S. Code Annt. 1926, Vol. 3, p. 3487, Title 49, Sec. 1, Par. 9.

(b) Appellant is not so situated that it can claim the benefit of Paragraph 9 of Section 1 of the Interstate Commerce Act. In determining the rights of appellant the Supreme Court of Illinois said:

"An examination of the plat discloses that the coal company's mine is not on the Big Four and cannot be considered an industry on that road."

C. C. C. & St. L. Ry. Co. v. Illinois Commerce Commission, 315 Ill. 469.

(c) In Dering Mines Company v. Director General, etc., 62 I. C. C. 265, it was said:

"The complainants operate two local mines, the Dering Mine No. 3, situated on the Big Four, .8 mile

northeast of Eldorado, and the J. K. Dering Coal Company Mine No. 2, situated on the Illinois Central Railroad, 2.5 miles west of Eldorado. The complainants ask that the Illinois Central shall serve the mine on the Big Four, and that the Big Four shall serve the mine on the Illinois Central, under trackage agreements or switching absorption arrangements, and thereby make their mines joint mines. • • •

"The advantage which would accrue to the complainants if they should prevail would be a better car supply in times of car shortage, due to the opportunity they would then have to draw cars from both lines, and additional route to Chicago and other points reached by both lines, and access by each mine to local markets on both lines instead of only the local markets on its one line, as at present."

(d) The Commission refused this application on the theory that No. 3 was an industry on the line of the Big Four and No. 2 an industry on the line of the Illinois Central, followed a former case, and said:

"We there found, in substance, that the service of a mine by a carrier under a trackage agreement is, in practical and legal effect, the substantial equivalent of an extension of its rails to the mine."

Dering Mines Company v. Director General, etc., 62 I. C. C. 265.

(e) The case referred to by the Dering Mines case is

line of railroad, or of *any shipper tendering interstate traffic for transportation,* shall construct, maintain and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad *or private sidetrack which may be constructed to connect with its railroad,* where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper."

3 Mason's U. S. Code Annt. 1926, Vol. 3, p. 3487, Title 49, Sec. 1, Par. 9.

(b) Appellant is not so situated that it can claim the benefit of Paragraph 9 of Section 1 of the Interstate Commerce Act. In determining the rights of appellant the Supreme Court of Illinois said:

"An examination of the plat discloses that the coal company's mine is not on the Big Four and cannot be considered an industry on that road."

C. C. C. & St. L. Ry. Co. v. Illinois Commerce Commission, 315 Ill. 469.

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Dering Mines Company v. Director General, etc., 62 I. C. C. 265.

(e) The case referred to by the Dering Mines case is

Ridge Coal Mining Company v. Missouri Pacific, in which it was said:

> "It appears that substantially all the existing trackage agreements of the Burlington were entered into at a time when the carriers were actively competing for additional business. The Burlington objects to further extensions of its service to mines not on its rails on the ground that, during periods of car shortage, it is unable to provide an adequate supply of equipment for shippers to whom it already owes an obligation to furnish transportation.
>
> "It is our view that the service of such mines by the Burlington under trackage agrements is, in practical and legal effect, the substantial equivalent of the extension of its rails to them (Commercial Club of Superior, Wis., v. G. N. Ry. Co., 24 I. C. C. 96; Penick & Ford v. Director General, 61 I. C. C. 173).
>
> "The equality in treatment among shippers which the law requires of a carrier extends only to shippers whom it is under a duty to serve, and the Burlington owes no such duty to the complainant. A railroad must be allowed some latitude for the exercise of business judgment and discretion in determining the scope of its operations, having due regard for the provisions of the Interstate Commerce Act. Under paragraph 21 of section 1 of the act we may require a carrier to extend its line only when the extension is reasonably required in the interest of public convenience or when the expense involved will not impair the ability of the carrier to perform its duty to the public. Paragraph 22 of the same section provides that the authority granted by paragraph 21

shall not extend to spur, industrial, team, switching or side tracks located or to be located wholly within one state."

Ridge Coal Mining Company v. M. P. R. R. Co., 62 I. C. C. 259, at 260.

F.

APPELLANT'S TRACK IS NOT A SIDETRACK WITHIN THE MEANING OF PARAGRAPH 9, OF SECTION 1, OF THE INTERSTATE COMMERCE ACT.

(a) The evidence does not bring it within the description of such a track as found by the courts. The Supreme Court of Illinois said:

"Each case must rest largely upon its own facts."
C. C. C. & St. L. Ry. Co. v. Commerce Commission, 315 Ill. 469.

In the case of Detroit & Mackinaw Ry. Co. v. Boyne City R. R. Co., it was held that the term "spur tracks," as distinguished from extensions and connecting new lines as used in the Transportation Act, was held to mean tracks used for loading, reloading, storing and switching cars merely incidental to the regular train haul, while the latter are tracks over which there are to be train movements in the sense that such movements are actually transportation hauls from the shipper to the consignee.

Detroit & Mackinaw Ry. Co. v. Boyne City R. R. Co., 286 Fed. 540.

In the case of Marion & Eastern Railroad Company v. M. P. R. R. Co., the Supreme Court of Illinois said:

> "Ordinarily, spur or industrial tracks are those which are used for the loading, reloading, storing and switching of cars, and other services merely incidental to the regular train haul (Detroit & Mackinaw Railway Co. v. Boyne City, G. & A. Railroad Co., supra; Akers v. United New Jersey Railroad Co., 43 N. J. L. 110)."

Then followed a description of the proposed track and the specification of a test thought by the Supreme Court of Illinois to be conclusive. It was said:

> "The proposed track, according to the answer of the Missouri Pacific Railroad Company, will be more than a mile in length, and will run from its line to a coal shaft under construction by the West Virginia Coal Company. Appellant has already constructed a switch track to this new shaft, with the exception of the mine track, for which the material was on the ground. The new track, if built, will enter territory served by appellant, to and from which through routes and rates exist. While the answer avers that on the proposed track no line-haul rates will be established, nor regular continuous movements of trains made, nor a station erected, nor the billing of freight required, except through existing facilities, the effect of the construction of that track will be to afford railroad service in direct competition with appellant's road, on which, in connection with other railroads, through routes and rates have been

established. The track, if laid, will be used in interstate as well as intrastate commerce. It will be an extension of the line of the Missouri Pacific Railroad, rather than a spur, industrial, team, switching or sidetrack, as defined in Paragraph 22 of Section 1 of the Interstate Commerce Act.

"One of the reasons for the enactment of paragraph 18, above quoted, is to prevent the building of duplicate lines of railroad where an additional line will not serve the present or future public convenience and necessity, but will add to the burden of maintenance, which the public will be required to pay" (citation). "Congress has expressly prohibited railroad companies subject to the Interstate Commerce Act from extending their lines without the consent of the Interstate Commerce Commission."

Marion & Eastern R. R. Co. v. M. P. R. R. Co., 318 Ill. 443;
Missouri Pacific R. R. Co. v. Marion & Eastern R. R. Co., 271 U. S. 661, 70 L. ed. 1137.

In the case of Texas & Pacific v. Gulf C. & S. F. R. Co., the Supreme Court of the United States, in determining whether the Hale Cement Line was a spur in the sense in which that word is commonly used, reviewed the various indicia shown by the evidence, and after reviewing the various contentions in the evidence said:

"A truer guide to the meaning of the terms 'extension and industrial track,' as used in paragraphs 18 to

22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by the Transportation Act 1920."

And then proceeded to hold that a new policy had been established, and for the reason that the proposed line would encroach upon territory already served by another railroad it should be held to be not a side, spur nor industrial track within the meaning of the Interstate Commerce Act.

Texas & Pacific R. Co. v. Gulf C. & S. F. R. Co., 270 U. S. 277, 70 L. ed. 583.

G.

THE TRACK OF THE APPELLEE IS NOT A PRIVATE SIDE-TRACK BUT A PUBLIC INTERSTATE RAILWAY WHICH NEITHER THE ILLINOIS CENTRAL RAILROAD COMPANY NOR APPELLANT HAD THE RIGHT TO BUILD WITHOUT A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY ISSUED BY THE INTERSTATE COMMERCE COMMISSION.

(1) It is a public railway: either an extension of railways or a new connecting railway, or both, as a matter of fact shown by uncontroverted evidence.

(2) It is within the meaning and intent of Pars. 18 to 22, of Section 1, of the Interstate Commerce Act, an extension of railways of a new railway which could not be lawfully built without a certificate of public convenience and necessity issued by the Interstate Commerce Commis-

sion. The part of Pars. 18 to 20, Section 1, of the Interstate Commerce Act applicable is abridged as follows:

> "• • • no carrier by railroad subject to this act shall undertake the extension of its line of railroad, • • • unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction • • • of such • • • extended line • • •."

Paragraph (22):

> "The authority of the Commission (so) conferred • • • shall not extend to the construction • • • of spur, industrial, team, switching or sidetracks, • • • to be located wholly within one state • • •."

Paragraph (20):

> "Any construction • • • construction • • • contrary to the provisions • • • of paragraph (18) • • • may be enjoined by any court of competent jurisdiction at the suit of • • • any party in interest."

> Transportation Act (Feb. 28), 1920, Chap. 91, Sec. 402, 41 Stat. at L. 456, 477, 478, Comp. Stat. Sec. 8563, Fed. Stat. Anno. Supp. 1902, p. 96.

The Supreme Court of Illinois held that appellant's track upon the admitted facts of this case considered

upon review of orders of the Illinois Commerce Commission made under authority of a statute in substance the same as Paragraph 9, of Section 1, of the Interstate Commerce Act, is controlled by Paragraphs 18 to 20 of Section 1, of the Interstate Commerce Act.

(a) The Illinois statute is as follows:

> "Every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or receiver of freight, or of any corporation, person or municipal corporation owning, operating or controlling any wharf or harbor facilities, for a connection between the railroad of such railroad company and any existing or contemplated track, tracks or railroad of such corporation, person or municipal corporation, shall make such connection and provide such switches and tracks as may be necessary for that purpose and deliver and receive cars thereover: Provided, that such connection is reasonably practicable and can be installed and used without materially increasing the hazard of the operation of the railroad with which such connection is sought, and that the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company.
>
> "Under the conditions specified in the above proviso every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or receiver of freight, shall construct upon its right of way a spur or spurs

for the purpose of receiving and delivering freight thereby, and shall receive and deliver freight thereby."

1925 Cahill's Ill. Stat., Chap. 111a, Sec. 45, p. 1899.

(b) The Supreme Court of Illinois said:

"The first question involved in this case is whether or not this track, when constructed, would be a spur track, or, in fact, a railroad extension. If the former, jurisdiction lies in the Illinois Commerce Commission to enter the orders entered herein, provided the evidence shows a proper case; if the latter, the Commission has no jurisdiction, as jurisdiction over such matters is vested in the Interstate Commerce Commission by the Federal Transportation Act."

The Court then reviewed the material facts, stating the conclusive facts first:

"An examination of the plat discloses that the company's mine is not on the Big Four, therefore, cannot be considered an industry on that road. It is also shown by the plat and the evidence that the proposed road is over three and one-half miles in length, while the distance from the Coal Company's mine to the Big Four at Eldorado is about two and one-half miles. Whether this track is a spur track or a connection between two or more railroads and an extension of one or all depends upon the use to which it is adapted."

Then quoting definitions of spur, side and industrial tracks and quoting from the case of Detroit & Mackinaw Ry. Co. v Boyne City Railroad, 286 Fed. 540, and continuing:

> "The question then arises whether or not this track would, in effect, be an extension of any of these railroads. Under paragraphs 18 to 22, of section 1, of the Interstate Commerce Act (24 Stat. at Large 379), commonly called the Transportation Act, no extension of railway lines can be built or operated thereon without a certificate of convenience and necessity from the Interstate Commerce Commission, and if the construction and connection of this proposed track amount to an extension of a railway line, within the meaning of the Transportation Act, the building of such a track and the connection here sought are matters over which the Illinois Commerce Commission does not have jurisdiction, sole jurisdiction in such matters being vested in the Interstate Commerce Commission."

Then following:

> "In *Ridge Coal Mining Co. v. Missouri Pacific Railroad Co.*, 62 I. C. C. 259, the complainant mining company sought by petition before the Interstate Commerce Commission to require the Chicago, Burlington and Quincy Railroad Company and the Missouri Pacific Railroad Company to accord to the complainant the status of a joint mine. Complainant's mine was located on the Missouri Pacific railway system. It was alleged that the Chicago, Burlington and Quincy

had, by trackage agreements, extended its service to a number of mines competitive with the complainant which it did not reach over its own rails, and that the complainant would be unduly prejudiced if it were not likewise given a joint mine status. The trackage agreements referred to were shown to have been made before the passage of the Transportation Act. The Interstate Commerce Commission in that case, in denying the petition, held that service by the Chicago, Burlington and Quincy under a joint mine status or trackage agreements to mines not on its line, was in legal effect the substantial equivalent to the extension of its rails to such mines, and that such could not be required without a certificate of convenience and necessity, citing Commercial Club v. Great Northern Railway Co., 24 I. C. C. 96, and Penick & Ford v. Director General, 61 id. 173. It will be noted that there was, in that case, no attempt to force an actual physical connection with the railroad, but to secure joint mine privileges to a mine not on the Chicago, Burlington and Quincy.

"It would seem clear under these holdings that whether such connection is a joint mine status by trackage agreement or by order of the Interstate Commerce Commission, or is an actual physical connection by bringing a track to the right of way of the road sought to be connected, the result is the same. Both constitute an extension of the latter road to an industry not on its line and are matters within the exclusive control of the Interstate Commerce Commission under the Transportation Act. While rulings of the Interstate Commerce Commission are not binding on this court, we think them particularly persuasive here, where the matter of this railroad con-

nection is bound up with the whole subject of interstate traffic, of which that Commission has jurisdiction.

"It appears that the coal company, prior to the institution of the proceedings herein, sought by petition before the interstate Commerce Commission, against the Illinois Central and the Big Four, to secure an order declaring a joint mine status as to its mines (Dering Mines Co. v. Director General, I. C. C. No. 10,945). At that time it was operating a mine on the Big Four eight-tenths of a mile northeast of Eldorado, known as mine No. 3, together with the mine involved in this proceeding. The petition alleged that failure on the part of the Big Four and the Illinois Central to accord such status resulted in unjust discrimination against the petitioner. The Big Four alone defended against the petition. The evidence showed that it had expended over $16,000,000 in improving its facilities and providing equipment for handling coal traffic in the Southern Illinois coal fields, and that it desired to use its equipment and facilities in the service of shippers to whom it was already under obligations. The Interstate Commerce Commission denied the petition, holding that, in effect, service to a mine not on the line of a carrier was the substantial equivalent of an extension of its rails to the mine, and that under the *Ridge Coal Mining Co. Case*, supra, such should not be ordered except in case of public convenience and necessity and where the added burden would not work hardship on the road or its patrons.

"Appellant argues that the proceedings in the two petitions under consideration here are but attempts to secure indirectly through this forced connection what

the coal company failed to secure in its proceeding before the Interstate Commerce Commission just referred to, and that the fact that the Illinois Central did not defend in the petition before the Interstate Commerce Commission and is one of the petitioners in petition No. 12,819 under a contract with the coal company indicates that this is an attempt to secure an extension of the line of the Illinois Central without first obtaining a certificate of convenience and necessity from the Interstate Commerce Commission. Regardless of the motives of the parties, we see no substantial difference, in effect, between the thing sought in the *Ridge Coal Mining Co. Case* and the case just referred to on the one hand, and the petitions under consideration here on the other. Both petitions in this case must be held to have been filed for a single purpose. Both seek, in effect, one thing, and that is one under the sole jurisdiction of the Interstate Commerce Commission, and is therefore one of which the Illinois Commerce Commission has no jurisdiction.

"But appellees urge that the contract for use of the proposed track cannot be carried out because of the limitation in the order of the Commission that it shall be used only for the purpose of hauling the coal of the Coal Company unless the consent of the Commission is had, and that therefore the track can be considered nothing more than a private spur-track. Regardless of the contract, it is well settled in this state that a railway track built and connected as here proposed becomes thereby a part of the public railway highways of the state, free and open to the use of the public (St. Louis, Springfield and Peoria Railroad v. Commerce Com., 309 Ill. 621; Public Utilities Com. v. Smith, 298 id. 151). It would, when

built, be open to the use of any and all shippers upon adjustment by the Commission of the proportionate cost thereof. The limitations in the orders of the Commission are therefore of no avail."

C. C. C. & St. L. Ry. Co. v. Commerce Commission, 315 Ill. 461, at 472.

(c) In another Illinois case in which the facts tending to establish the new construction which was alleged to be an extension of a railway and was, therefore, enjoined at the suit of the railway into whose territory the extension was projected, the principles established by C. C. C. & St. L. Ry. Co. v. Illinois Commerce Commission, 315 Ill. 461, were applied and followed by the Illinois Supreme Court, and that case came before the Supreme Court of the United States on a petition for a writ of certiorari, which was denied, and the principle established by the Illinois Court permitted to stand as the law. In that case the fact upon which the case turned was that the extension was from one railroad into territory already occupied by another competing railroad. In that case a temporary injunction was granted upon the filing of the bill. The defendant moved to dismiss the bill and vacate the order. The motion was denied. The defendant railroad company then answered the bill. In its answer it averred that the proposed extension would constitute a spur or industrial, 58,980 feet in length, to run from an existing spur on the line of the West Virginia Coal Company's mines to a new shaft

of the same company which was under construction. That no spur, industrial or other railroad track now serves the new mine shaft; that the only traffic which would move from the proposed track would be coal and supplies to and from the new shaft of the Coal Company, and that no other shipper would be served thereby; that no regular continuous train movement would be made over or passenger trains operated on the track; that no line-haul rates would be established or charged for traffic thereon, and no station, either for the accommodation of freight or passengers, would be built on the proposed extension; that the use of the new track would require no billing of freight to and from the mine other than that made at Bush Station; that this station is the terminal point of the Missouri Pacific Railroad at which the West Virginia Coal Company's shipments would originate and be billed for road-haul movements by other continuous transportation service, and that the spur would be used solely for loading, unloading, switching and other purposes connected with an incident to such service. The answer denied that, by the Interstate Commerce Act, or any other law, the Missouri Pacific Railroad Company was required to give notice of the construction of the proposed track, or that the track, if constructed, would cause irreparable damage to complainant. It denied that the new shaft of the Coal Company is served by the complainant, or any other railroad, and denied that for the purpose of constructing and operating the track a certificate of public convenience and

necessity, or other express authority, was required, and the answer was verified. A hearing followed at which only the complainant offered evidence. Its president testified that the Marion & Eastern Railroad extends from Marion in a northeasterly direction through the east half of Williamson County. It was built to develop that part of the county and give it railroad service; that connections are made with trunk lines at Marion; that in 1922 laid a switch track near the point where the shaft of the West Virginia Coal Company was to be sunk. The ties, rails and other material for the mine track were delivered on the ground. The West Virginia Coal Company then directed the complainant not to proceed with the construction of the main track, because the Coal Company would not at that time sink the shaft, and nothing further was done. The proposed track of the Missouri Pacific Railroad will reach the complainant's railroad near mile post No. 2, in the vicinity of Scranton Station. There are no coal mines at the point. A shaft is about to be sunk approximately 700 feet west of complainant's track, or about 200 feet from the switch track, which it constructed in 1922. Mines are under development east of the track and complainant purchased right of way into that territory to Crab Orchard. The witness had been over the route of the track proposed to be laid by the Missouri Pacific Railroad Company, and he had followed the stakes to the east of complainant's line. Complainant had laid its tracks from Scranton Station west to where the proposed mine

was to be opened. Through routes and joint rates from Scranton Station through Marion to coal-consuming markets were maintained by complainants in connection with the Missouri Pacific Railroad Company, the Illinois Central Railroad Company and the Chicago & Eastern Illinois Railroad Company. The witness was asked what effect the proposed extension would have upon complainant's road in a competitive sense. An objection to that question was sustained, the Court stating that it did not seem to be material. An employe of complainant testified that he saw stakes running west from its track in the vicinity of Scranton Station and also one east of the track, but it had since been removed. He testified that he saw a construction camp at the same place. At the conclusion of the testimony on behalf of the complainant the defendants moved to dismiss the bill to vacate the restraining order and vacate the injunction, which was done, and an appeal followed to the Supreme Court. The Supreme Court of Illinois, discussing the character of this track and emphasizing that its purpose was to invade the territory occupied by the complainant, the Marion & Eastern Railroad Company, reversed the Circuit Court under authority of the case of C. C. C. & St. L. Ry. Co. v. Commerce Commission, 315 Ill. 461, and the cases cited in the opinion of that Court, and said.

> "Appellant has already constructed a switch track to this new shaft, with the exception of the mine track, for which the material was on the ground. The new

and that when a railroad inflicts injury upon its rival it may be the public which ultimately bears the loss. (See Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 66 L. ed. 371, 22 A. L. R. 1086, 42 Sup. Ct. Rep. 232; New England Divisions Case [Akron, C. & Y. R. Co. v. United States], 261 U. S. 184, 67 L. ed. 605, 43 Sup. Ct. Rep. 270; Chicago Junction Case [Baltimore & O. R. Co. v. United States], 264 U. S. 258, 68 L. ed. 667, 44 Sup. Ct. Rep. 317; Railroad Commission v. Southern P. Co., 264 U. S. 331, 68 L. ed. 713, 44 Sup. Ct. Rep. 376.) The act sought, among other things, to avert such losses.

"When the clauses in pars. 18 to 22 are read in the light of this congressional policy the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, 'spur, industrial, team, switching or side-tracks * * * to be located wholly within one state.' Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover, the expenditure involved is ordinarily small. But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the

new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory the proposed trackage constitutes an extension of the railroad within the meaning of par. 18, although the line be short, and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. Being an extension, it cannot be built unless the Federal Commission issues its certificate that public necessity and convenience require its construction. The Hale-Cement Line is clearly an extension within this rule."

Texas & P. R. Co. v. Gulf C. & S. F. R. Co., 270 U. S. 277, 70 L. ed. 583;
R. R. Com. v. C. B. & Q. R., 257 U. S. 563, 590, 66 L. ed. 384;
Ala. & V. R. Co. v. Jackson & E. R. Co., 271 U. S. 248, 70 L. ed. 928, 930.

(e) Considering the history, object and purpose of paragraph 9, Sec. 1, under which this proceeding was instituted, entirely aside from the later provisions of the Transportation Act, it was held in determining whether a certain track was a lateral or branch line within the meaning of the act that

"it is plain from the provisions of the act, the history of the amendment and justice that the object was not

to give a roving commission to every road that might see fit to make a descent upon a main line, but primarily at least to provide for shippers seeking an outlet either by private road or a branch."

Interstate Commerce Commission v. D. L. & W. R. Co., 216 U. S. 537, 54 L. ed. 607.

II.

APPELLEE'S TRACK WITH RESPECT TO INTRASTATE COMMERCE IS A PUBLIC TRACK AND A PART OF THE RAILWAY SYSTEM OF ILLINOIS, THEREFORE, DOES NOT MEET THE REQUIREMENT AND DEFINITION OF PARAGRAPH 9, SECTION 1, OF THE INTERSTATE COMMERCE ACT, WHICH ONLY AUTHORIZES CONNECTION WITH A PRIVATE SIDETRACK.

(a) By the contracts under which it was built it is made a public track.

(b) By the understanding and agreement of the parties and the object to be attained it is to be operated as a public track.

(c) By the Constitution and laws of the State of Illinois it is made a public track.

Public Utilities Commission v. Smith, 298 Ill. 159;
St. Louis, Springfield & Peoria Railroad v. Illinois Commerce Commission, 309 Ill. 621;
C. C. C. & St. L. Ry. Co. v. Illinois Commerce Commission, 318 Ill. 461.

I.

CONSIDERED MERELY AS A SIDETRACK CONNECTED WITH AN INTRASTATE RAILROAD APPELLEE'S TRACK IS A PUBLIC AND NOT A PRIVATE SIDE OR SPUR TRACK AND IS OPEN AND FREE TO THE USE OF THE PUBLIC AS A PART OF THE RAILWAYS WITH WHICH IT CONNECTS. AND, THEREFORE, IS NOT WITHIN THE AUTHORITY AND DEFINITION OF PARAGRAPH 9, OF SECTION 1, OF THE INTERSTATE COMMERCE ACT AND NO SWITCH CONNECTION COULD LAWFULLY BE ORDERED BETWEEN IT AND THE RAILWAY OF APPELLANT.

(a) Under the evidence it would be a facility of the Illinois Central, Southern Illinois Railway & Power Company and appellant, and no facility of a railroad can be built without a certificate of public convenience and necessity from the Illinois Commerce Commission.

> "No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility, or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction."
>
> 1925 Cahill's Ill. Stat., Chap. 111 (a), Sec. 55, p. 1902.

(b) This track, when connected, would be available to use by landowners on either side of it and by those who might reach it by public highways and by the parties to the contracts and all other persons who might reach it over their railways or from spurs extended from it as a

part of the public railway highway of the state, and it is, therefore, a public track.

Public Utilities Commission v. Smith, 298 Ill. 159;
St. Louis, Springfield & Peoria Railroad v. Illinois Commerce Commission, 309 Ill. 621;
C. C. C. & St. L. Ry. Co. v. Illinois Commerce Commission, 315 Ill. 461.

J.

THE FACTS FOUND BY THE SUPREME COURT OF ILLINOIS ESTOPPED DEFENDANTS TO ALLEGE ANYTHING TO THE CONTRARY THEREOF IN THE PROCEEDING BEFORE THE COMMISSION.

Rule of Estoppel Is of Universal Application.

(a) It is a settled principle that where a point or matter is adjudicated between the same parties, or some of the same parties and the privies of the other, the matter thus adjudicated is conclusive between them in any subsequent suit where the same point or matter is sought to be put in question. As said by Bigelow on Estoppel:

"The class of cases now to be considered is that in which an estoppel arises regardless of any identity in the cause of action; the only requirement now being that the point in issue, as distinguished from the whole cause of action, shall be identical in the two cases. In these cases the judgment operates as an estoppel in regard to those matters in controversy upon which, or upon the determination of which, the

verdict or finding, as distinguished from the judgment itself, was rendered."

Bigelow on Estoppel (4th Ed.) 83;
Cromwell v. Sac, 94 U. S. 350;
Davis v. Brown, 94 U. S. 423;
Hanna v. Read, 102 Ill. 596;
Tilley v. Bridges, 105 Ill. 336;
New Orleans v. Citizens Bank, 167 U. S. 395, 42 L. ed. 210.

This rule is applicable to the decisions of boards, commissions and courts of limited and special jurisdiction, and to public officers required to exercise judgment and decide issues.

24 Ency. of L., pp. 723, 820.

(b) "A judgment at law, in any form of action, is conclusive upon the parties upon all questions, titles and rights involved in the litigation and passed upon by the Court, which the Court had power and jurisdiction to hear and determine, and nothing more; and when the same questions or the same rights or titles are again drawn in issue, whether in a court of law or equity, between the same parties or their privies, the previous adjudication will be regarded as conclusive upon them."

Hawley v. Simons, 102 Ill. 115.

(c) "When some specific fact or question has been adjudicated and determined in a former suit,

and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit without regard to whether the cause of action is the same in both suits or not. This is known as an estoppel by verdict and is equally available to a plaintiff in support of his action, when the circumstances warrant it, as when offered by the defendant as a matter of defense."

Hanna v. Read, 102 Ill. 596.

(d) This rule was applied by the United States Supreme Court, in Cromwell v. Sac County, as follows:

"For example: A judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy.

Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"But, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action—not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

"The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel. Thus, in the case of *Outram v. Morewood*, 3 East 346, the defendants were held estopped from averring title to a mine, in an action of trespass for digging out coal from it, because, in a previous action for a similar trespass, they had set up the same title and it had been determined against them. In commenting upon a decision cited in that case Lord Ellenborough, in his elaborate opinion, said:

"'*It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel.* The recovery of itself in an action of trespass is only a bar to the future recov-

ery of damages for the same injury; *but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact which, having been once distinctly put in issue by them or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them.*'

"And in the case of *Gardner v. Buckbee*, 3 Cow. 120, it was held by the Supreme Court of New York that a verdict and judgment in the Marine Court of the City of New York, upon one of two notes given upon a sale of a vessel, that the sale was fraudulent, the vessel being at the time unseaworthy, were conclusive upon the question of the character of the sale in an action upon the other note between the same parties in the Court of Common Pleas. The rule laid down in the celebrated opinion in the case of *The Duchess of Kingston* was cited, as follows:

"'That the judgment of a court of concurrent jurisdiction directly upon the point is as a plea of bar, or as evidence conclusive between the same parties upon the same matter directly in question in another court.'"

Cromwell v. Sac County, 94 U. S. 350, 24 L. Ed. 198.

(c) That the decision of a state court relates to rights sought to be exercised under a grant from the Federal Government makes no difference. The rule is the same and the decision of the highest court in the state is alike binding in that event. This principle was applied to condemnation proceedings to obtain land upon which to con-

struct approaches to a bridge built over a navigable river under the provisions of an Act of Congress.

Stone v. Southern Ill. & Mo. B. Co., 206 U. S. 269, 51 L. ed. 1059.

(f) The rule of estoppel by judgment applies as between the jurisdiction of the courts of the United States and the courts of the several states.

The Constitution of the United States, Section 1, Article IV, provides:

"Full faith and credit shall be given in each state to the public acts, judicial records and proceedings of every other state, and Congress may, by general law, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."

Con. U. S., Art. IV, Sec. 1.

(g) The courts of the United States are bound to give the judgments of the state courts the same faith and credit that the courts of one state are bound to give to the judgments of the courts of her sister states.

Cooper v. Newell, 173 U. S. 567, 43 L. ed. 808;
Wisconsin v. Pelican Ins. Co., 127 U. S. 291, 32 L. ed. 239.

(h) "A judgment of a state court in a cause within its jurisdiction and against a defendant lawfully sum-

moned, or against lawfully attached property of the absent defendant, is entitled to as much force and effect against the person summoned or the property attached when the question is presented for decision in a court of another state, as it has in the state in which it was rendered."

This paragraph is quoted from notes to Section 1 of Article IV of the Constitution of the United States, and is supported by many authorities.

11 Fed. Stat. Ann. 194.

(i) In the case of Everett v. Everett, 215 U. S. 203, 54 L. ed. 158, it was held that a judgment of a probate court in Massachusetts in a proceeding for separate maintenance under a summary statute where the complainant alleged that she was the wife of the defendant and entitled to separate maintenance, while he denied that she was his wife and interposed several affirmative defenses; that a decision denying relief to her involved the issue as to whether the complainant was the wife of the defendant, and that the judgment would be given effect as an estoppel in a subsequent proceeding in the courts of New York brought to set aside a decree of annulment.

Everett v. Everett, 215 U. S. 203, 54 L. ed. 158.

K.

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION REQUIRING APPELLANT TO CONNECT ITS TRACK WITH THE TRACK OF APPELLEE IS CONTRARY TO THE PUBLIC POLICY AS ESTABLISHED BY THE COURTS OF THE STATE OF ILLINOIS AND OF THE UNITED STATES, AND WHETHER APPELLEE'S TRACK BE A PUBLIC RAILWAY OR A SIDETRACK THE ORDER OF THE INTERSTATE COMMISSION COMPELLING APPELLANT TO CONNECT ITS RAILWAY WITH IT IS IN VIOLATION OF THE PENAL STATUTE.

(a) It is but a matter of inspection to ascertain that paragraph 9 of section 1 of the Interstate Commerce Act had not been changed or modified since its enactment many years ago. It has been carried in various revisions without modification. But, the enactment of the Transportation Act, by paragraphs 18 to 22, which now appear in section of the Interstate Commerce Act, the public policy of the Government in relation to the extension of railways and the construction of new railways is entirely changed. The original section must be read with the amendments of the Transportation Act and the intent of Congress derived therefrom. Congress had in mind and was endeavoring to correct the disastrous evils both to the railroads and to the public which for many years had attended the construction of lines of railroad, main and branch, in ruinous competition with each other and with resultant injury to the public, which was compelled to bear the inevitable consequences of such a situation.

Detroit & Mackinaw Ry. Co. v. Boyne City Ry. Co., 286 Fed. 540;

Railway Commission v. Southern Pacific Company, 264 U. S. 331, 68 L. ed. 713, 764;

Texas & Pacific v. Gulf, Colo. & S. F. R. Co., 270 U. S. 277, 70 L. ed. 583;

Western & Atlantic R. R. Co. v. Georgia Public Service Commission, 267 U. S. 493, 497, 69 L. ed. 757.

(b) The same policy has been established by the State of Illinois in relation to all public utilities.

Choate v. Commission, 309 Ill. 256.

To build a new facility of any kind without a certificate of public convenience and necessity is a violation of the Illinois law. Section 55 of the Public Utilities Act provides:

"No public utility shall *begin* the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility, or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction."

1925 Cahill's Ill. Revised Stat. 1902.

Section 76 of the Public Utilities Act provides:

"Any public utility or any corporation other than a public utility, which violates or fails to comply with any provisions of this act, or which fails to obey, ob-

serve or comply with any order, decision, rule, regulation * * * shall, upon conviction, be punished by a fine of not less than five hundred dollars."

Section 77 of the Public Utilities Act provides:

"Every person who, either individually or acting as an officer, agent or employe of a public utility or of a corporation other than a public utility, violates or fails to comply with any provisions of this act * * * is guilty of a misdemeanor * * *."

1925 Cahill's Ill. Stat., Chap. 111 (a), Secs. 76, 77, p. 1909.

(c) Paragraph 18, Section 1 of the Interstate Commerce Act provides:

"After ninety days after this paragraph takes effect no carrier by railroad subject to this act shall undertake the extension of any line of railroad or the construction of any new line of railroad, or shall acquire or operate any line of railroad or extension thereof, or shall engage in transportation under this act over and by means of such additional extended lines of railroad, unless and until there shall first be obtained from the Commission a certificate of present or future convenience and necessity," etc.

(d) Paragraph 20 of Section 1 of the Interstate Commerce Act provides:

"Any *construction*, operation or abandonment contrary to the provisions of this paragraph or of para-

graphs 18 or 19 of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party in interest, and any carrier or any director, officer, receiver, operating trustee, lessee, agent or person acting for or employed by such carrier who knowingly authorizes, consents to or permits any violation of the provisions of this paragraph or of paragraph 18 of this section shall, upon conviction, be punished by a fine of not more than $5,000.00 or by imprisonment of not more than three years, or both."

3 Mason's U. S. Code Annt. 1926, Title 49, Sec. 1, Pars. 18 and 20, p. 3489.

It therefore appears that the order of the Commission is contrary to the policy established both by the State of Illinois and the United States, and whether this track be regarded as a sidetrack within the jurisdiction of the Illinois Commission, or an extension or new railway within the jurisdiction of the Interstate Commerce Commission, the order of the Commission required it to be connected and used in a violation of either the penal provisions of the Illinois statute or the penal provisions of the federal statute.

The assumption of the Interstate Commerce Commission that the mere connection of this track ordered by it could be within its power and jurisdiction, notwithstanding the track itself was unlawfully built and cannot be maintained, is in conflict with the fundamental maxims of the law. "*The principle gives character to the incident and not the incident to the principle.*"

ARGUMENT.

May It Please the Court:

We have endeavored to make a full statement of all the material facts relevant to the questions we are presenting by this appeal. In doing so we realize that we have necessarily stated many facts not of controlling importance, but, nevertheless, thought to be pertinent to a correct understanding of the case as a whole, or of some fact deemed relevant.

Classes of Evidence Omitted.——Two classes of evidence we have but alluded to and made no effort to fully state: (1) that relating to practicability, safety and cost of constructing and connecting the switch between appellant's railway and the new track constructed by appellee, and that concerning whether sufficient revenue would come to the appellant from the connection to justify the expense of constructing and maintaining it. These were contested questions before the Commission, and a review of the evidence, we think, would show that they were decided contrary to the manifest weight of the evidence. Nevertheless, as there was some evidence tending to support the contentions of appellee upon those issues, we understand that this Court would hold those questions finally settled in favor of appellee by the finding of the Commission; (2) all evidence as to good and bad faith on the part of either the appellant or appellee in

negotiations concerning a reciprocal switching arrangement, or a switch connection with a proposed spur track, and all that which relates to the need of appellee for more efficient service from the Illinois Central Railroad Company, and the effect a new connection with appellant's railway might have on the development of its mine or the enlargement and extension of its business, we have treated as immaterial and merely alluded to the same as a part of the case heard by the Commission. We have only stated this evidence sufficiently to show that it was made a dominant issue which we then and now contend was wholly immaterial to the issues made upon appellee's complaint or petition.

Misconception of the Issues by the Commission.——When the complaint was filed before the answer was due under the rules of the Commission the case was referred to the "Service Division," which is No. 5, of the Commission. When Director Bartel of that division, sitting as Examiner in this case, attempted to state the issues before him, although the answer had then been on file several days, he totally disregarded the affirmative defenses set up in the answer, as shown in our statement, and said in substance that the questions were whether the sidetrack had been built, whether a demand had been made for a switch connection therewith and whether it would be practicable, reasonably safe and the revenue to be derived to the appellant by the connection would justify the expense.

Counsel for appellant then made an effort to draw his attention to the defenses stated by the answer and suggested that the questions to be tried were not "questions of service," but of power and authority under the admitted facts to build and maintain such a track, and whether the Commission had power to require appellant to make a connection with a track which had been built without authority and is an unlawful structure (R. 180). Neither the answer, the evidence relied upon to sustain the affirmative averments thereof, the citation of authority, nor the persistent efforts of counsel for appellant were sufficient to secure the attention of the Examiner or the members of the Interstate Commerce Commission to the affirmative defenses relied upon by appellant. This is shown by a statement contained in the Commission's report, entirely too narrow to cover all of the affirmative defenses presented, but sufficient to disclose that the Commission never varied from its original conception that this is only a case of willful refusal to render service that the appellee was clearly entitled to have. The statement of issues made by Director Bartel and adhered to by the Commission throughout its consideration of the case is as follows:

> "Specifically the defendant opposes the installation of a switch connection, or an order from the Commission requiring same on the following grounds: (1) That the building and maintenance of such a track is beyond the scope and power granted the complainant by the Illinois charter; (2) that such a track by rea-

son of the contracts between the complainant and the Illinois Central and between the complainant and the Power Company will, under the law of Illinois, become a public track and be a part of the public highway of the railways with which it shall be connected, and that an order requiring the connection sought would be in legal effect an extension of defendant's line to a point not consented to and would in effect be a taking of property without due process of law and a denial to it of the equal protection of the law; (3) that the making of the proposed connection would complete a new connecting railway between the Central and defendant without a Certificate of Public Convenience and Necessity having first been obtained as required by the Illinois Commission's law and the Interstate Commerce Act; (4) that the connection would not be reasonably practicable, nor could it be put in with safety, nor would it furnish sufficient business to justify its construction and maintenance.

"The first two contentions are primarily matters for judicial interpretation and they will not be further considered here.

"Under the third contention the defendant argues that the construction of this mine track comes within the provisions of Paragraphs 18 to 21 of Section 1 of the Interstate Commerce Act. In other words, that it is an extension of the railway of the Central, and, therefore, a Certificate of Public Convenience and Necessity should first have been obtained. To this we do not agree. We are not here called upon to determine what effect the contracts heretofore referred to may have in the event that operation of the mine track by the Central or the Power Company is undertaken" (R 446)

It is evident from this statement that the only question which the Commission deemed relevant was whether this track may *hereafter* be operated in interstate commerce in pursuance of the terms of the contracts between appellant and the Illinois Central and the Power Company, respectively; totally disregarding and refusing to consider that by its very statement the implication is carried that the Commission was convinced that this track was constructed as an interstate railway to be operated both as a connecting line and as an extension in direct violation of the words of Paragraph 18, Section 1 of the Interstate Commerce Act, "No carrier by railroad subject to this act shall *undertake* the extension of any line of railroad or *the construction* of any new line of railroad," without first obtaining a Certificate of Convenience and Necessity from the Interstate Commerce Commission, and section 20, which provides that *any* construction by *any person*, or *corporation*, in violation of the provisions of paragraph 18, shall subject the *person*, or *corporation*, to a fine of not more than five thousand dollars or imprisonment for not more than three months, or both. The Commission treated the word "undertake" in paragraph 18 as though it read, "shall hereafter operate." Other phrases in the section cover the matter which the Commission must have had in mind when it said, "We are not here called upon to determine what effect the contracts heretofore referred to may have in the event that opera-

tion of the mine track by the Central or the Power Company is undertaken." Another clause covers that situation, not here pertinent. It thus appears that, aside from the issues formed by a denial of the material and jurisdictional allegations of the complaint, all other issues were by the Commission neatly set aside to be decided by some other tribunal, or by the Commission upon a future complaint. This was a clear misconception of its duty, for the question whether appellee had undertaken the extension of a railway or the construction and connection of this track to serve as an interstate railway was directly involved in the issues, and in entering the order for the connection, thereby completing the unlawful construction, the Commission compelled appellant to violate paragraph 20, and literally incur the penalty imposed by that paragraph. Not only on this issue, but on every other involving the lawfulness or unlawfulness of the structure, the Commission assumed that if there was literal authority in paragraph 9 of section 1, authorizing the Commission to order the construction of a switch connection, all other provisions, both of the same section and of the Constitution and laws of Illinois from which alone authority could be derived to construct such a track, might be disregarded, and that the mere incident of a switch connection would give color and character to the entire track so far as the Commission is concerned, thus overlooking the elementary maxim of logic and law that the principal controls and gives color to the incident and not the incident to the

principal. The less is contained in the greater. The track includes the connection, the connection does not include the track. Within the meaning of this statute a structure is *not* a track unless it may be lawfully constructed and maintained.

Failure of Appellant to Secure the Attention of the District Court to the Real Issues.——The District Court likewise excluded from its consideration all of the affirmative contentions shown by the record to have been made by appellant before the Commission. It confined its consideration to the issues formed upon the complaint as embracing the entire merit of the case and manifested an antipathy to the position taken by counsel for appellant that this track was unlawfully built and is shown by the evidence to have been constructed for the purpose of invading the transportation territory of appellant.

These facts, though urged with sincerity, apparently made no impression whatever upon the District Court: (a) That appellee's mine is located on the railway of the Illinois Central 2.5 miles from the rails of appellant; (b) appellee had never been a shipper from this mine in interstate commerce on the railway of appellant, except as a connecting railway with the Illinois Central and intermediate carriers; (c) that appellant is located on a line of one of the largest coal-carrying railways in the southern coal district of Illinois and has potentially, at least, the greatest facilities for transportation that can be afforded by any railway company in the Mississippi Valley,

both for expedition and breadth of market range; (d) that the charter of appellee does not authorize and the Constitution and laws of Illinois forbid appellee to build, maintain, lease or operate a railroad track across public highways, or connect, or to be connected with common-carrier railways; (e) that this track in physical construction, location and appearance, the uses for which intended and the relation it would sustain to the railway of appellant and of the Illinois Central is not and cannot become a *sidetrack;* (f) that it was built under contracts which fix its character for use by three railway companies as an interstate and intrastate railroad; (g) that assuming contrary to the fact that this is a *private sidetrack*, it cannot under the laws of Illinois be maintained in existence or lawfully used in intrastate commerce unless the superior sovereign, the United States, shall override the Constitution and laws of Illinois and the decisions of its Supreme Court that it is an unlawful structure built by a corporation having under its charter no power to build it, and that aside from that question its construction and maintenance is by Paragraph 22 of Section 1 of the Interstate Commerce Act committed exclusively to the jurisdiction and power of the State of Illinois (United States Revised Code, Title 49, Sec. 1, Par. 22; Western & Atlantic R. Co. v. Georgia Public Service Commission, 267 U. S. 493, 497); (h) that the evidence undisputed shows that this track was built as and for a connecting railway and an extension of railways without a Certificate of Public Con-

venience and Necessity from the Interstate Commerce Commission; (i) that if a sidetrack, its construction cannot lawfully be commenced without a Certificate of Public Convenience and Necessity from the Illinois Commission. If a railway, or an extension, it could not be commenced without a Certificate of Convenience and Necessity from the Interstate Commerce Commission. If commenced as a sidetrack without such certificate the penalties of Sections 76 and 77 of the Illinois Commerce Act render the commencement a violation of a penal statute. If commenced as a new railway, or an extension of railways to be engaged, or engaged, in interstate commerce would violate the penal provisions of the Interstate Commerce Act.

All this we urged upon the attention both of the Commission and the Court, and though we may be obtuse, we do not understand why these questions were not regarded as of sufficient importance to challenge the attention, first, of the Commission and, later, of the Court.

District Court in Conflict With Policy Established by the Transportation Act.——Undoubtedly the Court did not appreciate the policy established by the Transportation Act, and, as this Court has said, that policy is the key to the interpretation of the provisions of paragraphs 18 to 22. In a similar case in which counsel assumed a similar attitude in construing these paragraphs, after enumerating

the various similar contentions made by them, this Court said:

> "A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern, that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss" (Texas & P. R. Co. v. Gulf, C. & S. F. R. Co., 270 U. S. 277, 70 L. ed. 583).

Speaking of the power of Congress over intrastate operations to promote the object to develop an adequate system of interstate railway transportation, this Court said: "The affirmative power of Congress in developing interstate commerce agencies is clear. In such development it can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce it deems necessary or desir-

able. This is because of the supremacy of the national power in this field" (R. R. Com. v. C. B. & Q. R. Co., 257 U. S. 563-590, 66 L. ed. 371, 382, 384).

Emphasizing the scope of the Transportation Act intended by the general policy of the act, as clearly expressed by its general terms, you said: "While none of the amendments in specific terms confer upon the Commission exclusive power over physical connections between railroads engaged in interstate commerce, it is clear that the comprehensive powers extend to junctions between main lines like those here in question" (Ala. & V. Ry. Co. v. Jackson & E. Ry. Co., 271 U. S. 244, 248, 70 L. ed. 928, 930.

The necessity of sufficient limitation of the power of the several states over construction and operation to prevent evasion of the requirements of the Transportation Act and prevent interstate carriers from defeating the manifest objects of that act, under the pretense that the questioned construction or act is, in its nature, intrastate and for intrastate use and not within the provisions of the act of Congress. This sort of evasion, we assert, was attempted in the effort to get state authority to construct this track in a direct grant to the Illinois Central, and afterwards obtaining the grant to appellee, an Illinois corporation, without charter power to exercise it, thus, in substance, giving the granted power to the Illinois Central to be exercised in the name of appellant.

The views expressed by Circuit Judge Evans, presiding on the three-judge court, is in apparent conflict with the views thus expressed by this Court. Considering whether the Court would allow appellant the usual stay or injunction order pending an appeal from its order dismissing the bill for want of equity, a motion for which was by the way denied, on the subject of the irreparable injury that would result by requiring the connection, counsel for appellant mentioned the invasion of its coal field by other carriers and the interference with its ordinary operations on tracks congested with the traffic of industries located on its own railway as elements of damage. To this Judge Evans replied:

> "Your latter statement only goes to show the absolute necessity of government regulation. That is exactly what public utilities ought to do, they ought to care for *anybody anywhere under all circumstances.* • • • *I cannot understand it.* What you get one place you lose in another, but you are the carrier of commerce, that's your only duty."

This statement is the more surprising coming from the presiding Judge of the Court to whom a brief had been submitted quoting the language of this Court, both in **Texas & Pacific R. Co. v. Gulf, Colo. & S. F. R. Co.**, supra, and the language of Chief Justice Taft in **Railroad Commission v. Southern Pacific Company**, 264 U. S. 343, 345 (R. 170).

There was no question of discrimination in the issues. What was said by the learned Judge, therefore, must have had reference to our contention that appellee should not be permitted to engross overtaxed facilities from shippers on our railway, nor the Central and the Power Company be permitted to invade our coal territory and take from our railway a coal business that we have built up within the last twenty years by a capital investment of approximately twenty millions of dollars to enable the appellant to furnish shipping facilities to the coal producers who have located their mines on our railway in anticipation of the facilities we had provided for their use. The implication is clear from what was said by the presiding Judge that for us to endeavor to preserve the facilities upon faith of which they have located their industries on our line against such an invasion of the rights of our patrons so located and the revenues upon the faith of which appellant made this enormous investment is a violation of appellant's duty as a common carrier. If we understand the interpretation made of the Transportation Act by this Court, we were not only within our rights in taking that position, but it was our duty to do so.

Interstate Commission Bound by Statutes and Decisions of Illinois Establishing That the Track of Appellee Is An Unlawful Structure (II A. Brief, p. 63).——The Commission rightly held by implication that it had no control over the construction or abandonment of a private side track located wholly within a state, but wrongfully as

sumed that it was not bound by the decisions of the Supreme Court construing the Constitution, statutes and contracts under which the track was constructed to determine whether it is a public or a private track, or whether it is an unlawful structure which when completed would violate penal statutes. This would seem to be an elementary principle not necessary to argue to this Court, but it is very apparent from a reading of the Commission's report that it took the view that the character of the track was not involved in the issues. In that false premise we insist its erroneous conclusions have their origin. We have collated a number of authorities under the corresponding division of the preceding brief of the argument to which we shall refer in the subtitles of this division of the argument, which seem to establish beyond controversy that on this very question of separation of jurisdiction between side, spur and industrial tracks and new railways and extensions of railways this Court has settled that the law of Illinois is applicable and shall control the construction and maintenance of this track if it is the character of track, namely, a sidetrack, as held by the Interstate Commission. It is inconceivable that this Court would hold that although this track is an unlawful structure which cannot be maintained that it was yet within the legal power of the Interstate Commerce Commission to order a switch connection with it and thus complete it as a track. If all of that part of the track between appellee's mine and the switch connection was unlawfully con-

structed and cannot be maintained, it would seem futile for the Interstate Commission to order it connected, but it has done so on that theory. If, as this Court has repeatedly held, its construction and abandonment is within the jurisdiction of Illinois and it has been condemned as an unlawful structure by the highest court of the state, then it would be an encroachment upon the jurisdiction of Illinois ceded by paragraph 22, as construed by the federal courts, to compel the connection, but that appears to be exactly what has been done in derrogation of Illinois jurisdiction, for the present conceding the track is a private sidetrack. We cannot believe this Court will give its approval to such a theory or such procedure.

What statutes and court decisions apply in the case just stated? We insist those of Illinois. It would result in confusing absurdity to hold that Illinois has exclusive right to decide and at the same time to assert that its conclusion is not binding, but that the Commission's report is in effect just that and nothing else.

In the case of Smith v. Mernochen, 7 How. 217, supra, this Court said:

> "The highest court of the State of Alabama has given a construction to the act of the Legislature chartering this company, which we have seen is fatal to a recovery. It belongs to the state courts to expound their own statutes; and when thus expounded the decision is the rule of this Court in all cases depending upon the local laws of the state" (II-A-[e], Brief, p. 64).

It is also clear that this Court has not construed paragraph 9 of section 1 as the Commission construed it. The words "shipper," "lateral branch line" and "private sidetrack," in paragraph 9, do not relate to what the structure may become, but to what it must be at the time the complaint was filed. On that subject this Court said:

> "The words 'lateral branch line' do not refer to what the applicant may become or be by the order of the Commission, but to what it already is when it applies" (United States v. B. & O. S. W., 236 U. S. 18, supra) (II A [f], Brief, p. 65).

This establishes that it was for the Commission to determine the status of the track with which the connection was proposed and that it erred in holding that any track built by anyone without regard to the lawfulness or unlawfulness of the structure, or the purposes to which it is to be devoted, may be lawfully ordered connected and that these things and the uses which would be made of it in intrastate commerce, are questions not within the issue in a proceeding of this sort.

A Track Built From One Railway to An Industry Located on Another Is Within the Prohibition of Paragraphs 18 to 22 of Section 1 of the Interstate Commerce Act (II-B, Brief, p. 66).——The purpose of enacting paragraphs 18 to 22 was to prevent wasteful construction and extension of railways into new territory when not needed to give service to the public, and wasteful competition.

Although a particular track may have many of the indicia of a private side or spur track, if it is built into new territory already served by another carrier as a means of competition, it is within the prohibition of these paragraphs. There was a disposition on the part of the Commission to treat this track as though it were the private property of the appellee and to totally disregard any public character that may attach to it in consequence of its location and intended uses. Would that make any legal difference? We answer no. The character of the track, as we have indicated, must be determined by the facts of the particular case, and the law of the State of Illinois authorizing or prohibiting its construction. The significance of the location of the legal title to it is equally a question of Illinois law. It is, therefore, important before discussing the main questions to determine whether the fact of legal title is controlling, or whether it is immaterial to the consideration of the character of the track as public or private, and whether a sidetrack as related to railroads and railroad uses. Long before any Public Utilities Act became a law of Illinois the legal character of a track constructed as this is upon or across highways was determined by the Supreme Court of Illinois in a long line of decisions. Primarily, an individual has no right to build any structure in a public street or upon public grounds. Early in the history of the state ordinances were enacted by city councils giving the right to the owners of industries to locate industry tracks in public streets and connect

them with railways for the purpose of affording railway transportation to and from their industries, on the main lines of railways or to reach the same. The question, therefore, early arose whether such ordinances were valid. Suits were brought to compel the removal of such tracks from public streets. The Supreme Court of Illinois held that the location of a track upon or across a street unconnected with a railroad would be a purpresture upon the street. Such unconnected track would be useless to anyone. The intent of such an ordinance must be that the track should be connected with the main track of a railway, and as such a grant to an individual is in substance to the railway corporation with whose railway it has been or is to be connected, it was held that when connected, regardless of the title to the track, it becomes a public railway and a part of the railway system with which it is connected, regardless of title or ownership when considered in its relation to the railway and to the public. This question was fully considered and the cases cited in the case of St. Louis, Springfield & Peoria Railroad v. Commerce Commission, 309 Ill. 621, at 625 (II-B-[a], Brief, p. 66).

In considering this track, therefore, in its relation to the railways of the Illinois Central, the Power Company and appellant, it must be considered as a part of the railways with which it connects, and its public character is conclusively settled by the decisions of the Supreme Court of Illinois holding that it is a public track and a part of

such railways, and that the fact of the legal title to the track and the land upon which it is located is a matter of no importance.

We have mentioned the principle and cited the decisions of this Court which establish the public policy intended by the enactment of the Transportation Act. That policy has been recognized by the Courts of Illinois and one of such cases came before this Court for consideration. The Illinois interpretation and construction of Paragraphs 18 to 22 of Section 402 of the Transportation Act, now Section 1 of the Interstate Commerce Act, in that case had the approval of this Court.

In the case of Marion & Eastern Railroad Company v. Missouri Pacific Railroad Company, 318 Ill. 436 (II-B-[c], Brief, p. 68), the Virginia Coal Company located a mine on the railway of the Marion & Eastern. A track was extended by the Marion & Eastern to the property line. The sinking of the mine was abandoned for a period of time. At the time that work was about to be resumed the Missouri Pacific prepared to extend a track a distance of about one mile from one of its industry tracks to the mine for the purpose of competing with the Marion & Eastern for the transportation of coal from the new mine. The Marion & Eastern brought an injunction suit in the Circuit Court of Williamson County to restrain the construction of the track and a temporary injunction was granted. On motion to dissolve and upon a hearing which presented the facts and contentions of the respective parties, the

Circuit Court of Williamson County dissolved the injunction and dismissed the bill for want of equity. Upon appeal to the Supreme Court of Illinois it was held that ordinarily spur or industrial tracks are those which are used for the loading, reloading, storage and switching of cars and other services merely incidental to the regular train haul. The issues showed that this track was not to be used for such purposes, but that coal would be taken from the mine as a part of the transportation haul at the same rate as all coal would be hauled by the Missouri Pacific from other mines located upon its rails. It also appeared that this mine, as located upon the Marion & Eastern, would have direct connection with the railway systems of the state and enjoy transportation facilities of those railways, a part of the haul, of course, being over the line of the Marion & Eastern. It was, however, considered by the Supreme Court of Illinois that the determining factor which established the character of this track was that it entered territory already served by the Marion & Eastern, and that the facts that on this track there would have no line-haul rates, no continuous train movements on it, no stations erected, no billing of freight required, except through existing facilities, did not make it a sidetrack or industry track; that the effect of its construction would be to afford railroad service in direct competition with the railway of the Marion & Eastern already in the field, and for that reason the track was a duplication of lines of railway not shown to be necessary for the present or future

public convenience and necessity, but to add to the burden of maintenance which the public would be required to pay; and, therefore, the construction of the track by the Missouri Pacific was an extension of its railway in violation of Paragraph 18 of Section 1 of the Interstate Commerce Act, because attempted without a Certificate of Public Convenience and Necessity. A petition for a writ of certiorari was presented to this Court to review these conclusions of the Supreme Court of Illinois in case No. 1009, Petition for Writ of Certiorari, 271 U. S. 661, 70 L. ed. 1137, and denied, the effect of such denial being the approval of the conclusions of the Supreme Court of Illinois upon the facts of that case (II-B-[e], Brief, p. 70).

On March 1, 1926, this Court, in the case of Texas & Pacific R. Co. v. Gulf, Colo. & S. F. R. Co., supra (II-B [d], Brief, p. 69), held that the fact that a railroad company is building a line for the purpose of enabling it to compete with another railway company in transportation from an industry on the line of the latter, makes it an extension of the railway from which the new track is extended. This Court in that case found the same test as controlling as that applied in the case of Marion & Eastern v. Missouri Pacific, supra, and, among other things, said:

> "When a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss."

In denying the petition for a writ of certiorari in the case of Missouri Pacific v. Marion & Eastern, No. 1009,

your Honors undoubtedly had in mind your conclusions in the case of Texas & Pacific v. Gulf, Colo. & S. F. R. Co., and applied them to the Marion & Eastern case. The remedy of the public for failure of a common carrier or public utility to discharge its duty of adequate service is not new construction and competition. The Supreme Court of Illinois, considering a statute somewhat similar to Paragraphs 18 to 22 of Section 402 of the Transportation Act, pointed out the remedy of the public in harmony with the views expressed by this Court in the cases cited in these words:

> "The statute (the Public Utilities Act) provides the means of compelling the existing transportation system to provide adequate service for the public. If the people living in the territory through which the Aurora, Elgin and Chicago Railroad operates are not being properly served they can file a complaint with the Commerce Commission, which has the power to order whatever change or increase in service the evidence warrants. If the existing transportation company does not comply with the Commission's order, then a situation *may* arise where the public convenience and necessity will require the establishment of another system. The theory of the Public Utilities Act is to provide the public with efficient service at a reasonable rate by compelling an established carrier occupying a given field to provide adequate service and at the same time to protect the existing utility from ruinous competition (West Suburban Transportation Co. v. Chicago and West Towns Railway Co.,

ante, p. 87, 309 Ill.). By this method the public is protected from paying the cost of the operation of competing systems and a return upon double the investment of capital" (Choate v. Commission, 309 Ill. 256) (II-B-[e], Brief, p. 70).

The record shows and upon a precisely similar record the Supreme Court of Illinois held that the appellee had made no complaint, either to the Illinois Central or to the Illinois Commerce Commission, of the failure of the Illinois Central, or its inability to perform adequate service at reasonable rates for the transportation of the product of appellee's mine, nor is there any contention that a joint route or through rate was ever requested from its mine to any point within the State of Illinois that was denied. The uncontroverted evidence did show, however, that one such application over the railway of the Illinois Central and appellant through the Eldorado connection was granted and that the appellee was more than satisfied with the rate fixed by the Illinois Commission and consented to its modification upward (R. 217).

Appellee Had No Charter Power to Construct the Track and Is Expressly Prohibited From So Doing By Illinois Statutes (II-C, Brief, p. 71).———Appellee is a private corporation of Illinois only authorized by its charter to mine and sell coal and without charter power to build, own, lease, maintain or operate a railroad and is prohibited by Sections 55 and 58 of the Illinois Public Utilities Law

from laying a private railroad track across a public highway or a public railway. In the case of The C. C. C. & St. L. Ry. Co. v. Commerce Commission, 315 Ill. 477, the Illinois Supreme Court, dealing with this case as presented to the Illinois Commerce Commission upon the same facts in relation to charter powers of appellee, said:

> "A coal corporation is not a public utility" (Public Utilities Act, Sec. 10), "but is a private enterprise. It possesses no charter powers to build a railroad" (II-C-[a], Brief, p. 71).

Section 10 of the Public Utilities Act, defining what a public utility is, excludes all private corporations transacting merely an ordinary commercial business (II-C [b], Brief, p. 71).

Section 55 of the Public Utilities Act, conferring authority upon railroads to construct a new track across a public highway, prohibits its doing so without a Certificate of Public Convenience and Necessity. Such a track would be a new facility and under the provisions of this section no public utility can construct a new facility, plant or equipment not in substitution of an existing plant, equipment or facility, nor an extension of any plant, equipment, property or facility without a certificate of public convenience and necessity (II-C-[c], Brief, p. 73).

It is settled by the decisions of the Supreme Court of Illinois that a private corporation cannot build such a track exclusively for its own use (II-C-[d], Brief, p. 74).

The Public Utilities Act also expressly prohibits the laying of any railroad track across a public highway without the consent of the Public Utilities Commission and confers no power upon a private business corporation to lay a track across a public highway or a public railway (II-C-[e], Brief, p. 74).

So strictly do the courts of Illinois apply the principle that a private track cannot be laid across a railroad or a public highway that it denied the right of eminent domain to a railroad company that attempted to lay a track across another railway to reach an industry upon the ground that such track when laid would be but a private track not needed as a railway facility (Litchfield & Madison v. Alton & Southern R. Co., 305 Ill. 388, 395) (II-C-[f], Brief, p. 75).

A large number of cases establish conclusively the principle for which we here contend (II-C-[g], Brief, p. 76). Discussing this question in one of the later cases, cited supra, the Supreme Court of Illinois said:

> "It has been frequently held by this Court that a railroad track, though used in connection with an industry on the line of the railway, is, as between the public and the railway company, a part of the railway, whether constructed by the railway company or the owner of the industry."

And, in that case it was said that it is only upon that theory that a track may be laid across a public highway

to connect with an industry, and if the railway company is not to use the track then a private individual or corporation can neither construct, maintain nor operate it (St. Louis, Springfield & Peoria R. R. v. Commerce Commission, 309 Ill. 621, at 625) (II-C-[g], Brief, p. 76).

If Interstate Commission Has No Jurisdiction of the Track As Assumed in Its Order the Illinois Law Controls Its Character (II-D, Brief, p. 77).———In analyzing the Commission's order we pointed to the fact that it assumed that the Commission had no jurisdiction of the construction, maintenance or character of appellee's track. If that is a correct assumption, which we deny, the track having been constructed under the laws of Illinois by an Illinois corporation with limited charter powers, is a public or private track as determined by the laws of Illinois, and we have shown that the courts of Illinois have settled definitely that such a track is in its nature public, whether a new railway, an extension of railways or a sidetrack (II-D-[a], Brief, p. 77). This is a proposition definitely settled by the highest courts in Illinois upon a matter assumed by the Commission to be within the jurisdiction of the Illinois Commission and Illinois courts, and such jurisdiction is ceded to Illinois by Paragraph 22 of Section 1 of the Interstate Commerce Act. Not only is that true, but this Court has so construed and so applied that paragraph, as we have already shown.

Appellee Not a Shipper on the Railway of Appellant (II-E, Brief, p. 77).———We now come to a discussion of the specific language of Paragraph 9 of Section 1 of the Interstate Commerce Act upon which appellant's complaint is predicated (II-E-[a], Brief, p. 77):

> "Any common carrier subject to the provisions of this chapter, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private sidetrack which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper."

The complaint charges that the track in question is a "private sidetrack" and was applied for by a shipper tendering interstate traffic for transportation. The Commission throughout the proceeding before it and at its various stages of progress, from Examiner to division and from division to entire Commission, treated these provisions as having application regardless of whether the proposed track is public or private. It also assumed that the words "shipper in interstate commerce" contained in

this paragraph would apply to any shipper without regard to his location or the railway upon which he is a shipper, or whether he is at present a shipper or a contemplated shipper. We then insisted and now insist that this application of these words is broader than the intent of Congress and justified by no reasonable rules of construction (II-E, Brief, p. 77).

We have just shown that whether the track is in fact a public or a private track so far as the Interstate Commerce Commission is concerned is definitely settled by the decisions of the Supreme Court of Illinois holding that such a track is a public track (II-D, Brief, p. 77). If the contention of counsel for appellee and the apparent conclusions of the Commission be correct, that it is no concern of the Commission as to what the intended use of this track may be, although that is a question which may arise in the future, still it cannot be disputed that whether it is a public or a private track was an instant question to enable the Commission to determine whether it was a track within the terms of paragraph 9. If determined that it was a public track, then appellee did not have such a track as paragraph 9 required when it made its application for the connection. Moreover, the Commission held in accordance with the decisions of this Court that it must have had presently such a track as paragraph 9 requires when it made its application for the connection (United States v. B. & O. S. W., 236 U. S. 18) (II-A-[f], Brief, p. 65). This paragraph was originally enacted to give a

shipper who needs it an outlet and not a roving commission to descend upon a railway at pleasure. Therefore, it cannot be construed to apply in favor of any shipper who has an outlet and may determine for ulterior reasons to make such descent (Interstate Commerce Commission v. Delaware, L. & W., 216 U. S. 537, 54 L. ed. 605) (II-G-[e], Brief, p. 84).

The object Congress intended to effect is, of course, a key to the interpretation of the language of this paragraph. If the language is harmonious with the object sought to be attained, it must be literally applied. This section makes provision both for the owners of lateral branch lines and for the owners of private sidetracks. It would require a broad stretch of imagination to conceive that Congress had in mind a shipper in interstate commerce on some other line of railroad than the one with which the connection is sought. If so, it must have meant any shipper on any other line of railroad than the one with which the connection is sought without reference to distance and intervening obstacles. The only questions for the Commission under such a construction would be whether the applicant is an intended shipper in interstate commerce located at any place, as was said by Judge Evans considering this very situation, located "anywhere and under all circumstances" (R. 170). Let us see what such a construction would lead to, and for an illustration let us take the situation in the coal field of Southern Illinois, as shown by the evidence and the exhibits of maps

to which attention has been called in the statement: This field is interlaced with the railways of the Illinois Central, the Burlington, the Big Four, the Chicago & Eastern Illinois, the Missouri Pacific, the Louisville & Nashville, the Southern, the Wabash, Chester & Western, and the Illinois & Missouri, each within distance to make this sort of descent upon the coal mines located upon the railways of all others. Judge Evans' construction of this statute would give each of these nine railroads the right to build a spur or connecting track and compete with all of the others at every mine in this territory where it is physically possible to build the tracks, and each of these railroads would be required to give connections to all of the others on its line to facilitate such competition, the theory being that if the track is constructed, no matter whether lawful or unlawful, and whether located upon highways and across other railways, if the track is in fact constructed the right to the connection under paragraph 9 of section 1 applies, and under it the connection may be secured. Separately considered, there can be no doubt that each connection would give to the railroad with which connected a sufficient revenue to justify the connection, but upon the whole many of the companies would lose heavily and in the end the public would suffer the losses incident to eight times more construction than is necessary to attain the object of reasonable rates and routes over this field to the principal markets reached by this group of railroads, and the weaker railroads would most likely be driven out of

business because the principal income of a number of them is derived from coal haulage. This situation may be further illustrated by the policy adopted by the Missouri Pacific in the case of the Virginia Coal Company. The Missouri Pacific came into this field many years after it had been occupied by the C. & E. I., the Illinois Central and the Burlington and found self interest made competition for business expedient. The incident of the attempt to connect with the mine of the Virginia Coal Company on the rails of the Marion & Eastern, to which we have alluded, is, however, but one of a number of such efforts made to build a competing extension and connect it with a coal mine on another railroad, and it is common knowledge in that territory that certain aggressive railway corporations determined upon a policy of connecting their rails with every existing mine in the territory located upon other railways they could reach. The decision of the Supreme Court of Illinois, approved by this Court in the case of Marion & Eastern v. Missouri Pacific, cut short that program and doubtless prevented a competitive warfare in that field among competing railroads, the losses of which would have fallen ultimately and heavily upon the general public. The language of the statute is: "Any shipper tendering interstate traffic for transportation." To whom must the traffic be tendered? Must it not be tendered to the company with whose railroad the connection is sought? Is the existence of a mine on the Illinois Central two and one-half miles from

the rails of appellant a tender of interstate commerce for the transportation of the railway of appellant? Does the unlawful construction of a track from that mine to the right of way of appellant constitute a "tendering" of interstate traffic to appellant? What do the words "any shipper" mean? Can they mean any person intending to become a shipper, or must he in fact be a shipper upon the railroad with which the connection is sought? The tender must also be made on a private side-track "which may be constructed." Should the Commission have held that a track unlawfully constructed is a track "which may be constructed"? Is it not apparent that this language will not apply to a shipper upon another railroad who seeks a connection from his plant to a railroad upon which its plant is not located? In legal contemplation is a track which can only be constructed in violation of law and cannot be maintained without a violation of the law a track which "may be constructed"? The Supreme Court of Illinois regarded the location of this track as forbidding its demand upon appellant for service. That Court said:

> "An examination of the plat discloses that the coal company's mine is not on the Big Four and cannot be considered an industry on that road."

Further reasoning on the subject this fact was held to forbid the conclusion that appellant as a common carrier owes to appellee a duty to transport coal from its mine

located on the Illinois Central (The C. C. C. & St. L. Ry. Co. v. Illinois Commerce Commission, 315 Ill. 469) (II-E [b], Brief, p. 78).

It may seem strange to this Court in view of what has been said, but the principle applied by the Supreme Court of Illinois is found in two very well considered opinions of the Interstate Commerce Commission. One of them happens to involve the precise situation we have here. In the case of Dering Mines Company v. Director General, 62 I. C. C. 265, it was said:

> "The complainants ask that the Illinois Central shall serve the mine on the Big Four, and that the Big Four shall serve the mine on the Illinois Central, under trackage agreements or switching absorption arrangements, and thereby make their mines joint mines."

Following a former case (Ridge Coal Company v. C. B. & Q.), it was said:

> "We there found, in substance, that the service of a mine by a carrier under a trackage agreement is, in practical and legal effect, the substantial equivalent of an extension of its rails to the mine" (II-E [c] [d], Brief, p. 78).

It was held that the Commission had no power to order such extension. Turning to the case of Ridge Coal Min-

ing Company v. Missouri Pacific R. Co., 62 I. C. C. 259, at 260, it was said:

> "It appears that substantially all the existing trackage agreements of the Burlington were entered into at a time when the carriers *were actively competing for additional business*. The Burlington objects to further extensions of its service to mines not on its rails on the ground that, during periods of car shortage, it is unable to provide an adequate supply of equipment for shippers to whom it already owes an obligation to furnish transportation."

Here the Burlington took the precise position that was so severely criticised in appellant by Presiding Judge Evans. The Burlington contended that it owed a car supply first to mines upon its own railroad. Appellant contended before the three-judge court that it first owed its trackage facilities, the use of which had reached maximum capacity, to industries upon its own railroad. It will appear that the Commission sympathized with the Burlington, but did not consider the plea of appellant, and appellant met the severe criticism of the Presiding Judge of the three-judge court. Continuing the Commission said:

> "It is our view that the service of such mines by the Burlington under trackage agreements is, in practical and legal effect, the substantial equivalent of the extension of its rails to them" (citing a number of cases).

"The equality in treatment among shippers which the law requires of a carrier extends only to shippers whom it is under a duty to serve, and the Burlington owes no such duty to the complainant."

Why did the Burlington owe no such duty to the complainant? The Supreme Court of Illinois found that such duty was not owing by the Burlington, nor by the appellant, because the complaining industry was not on the railway of the Burlington and appellee is not on the railway of appellant. We submit that this was sound logic and its own views should have been followed by the Interstate Commerce Commission. It was further found by the Supreme Court of Illinois that what the appellee asks for in this proceeding is the substantial equivalent of a reciprocal switching arrangement or a trackage agreement. On that subject it was said:

"It would seem clear under these holdings that whether such connection is a joint mine status by trackage agreement or by order of the Interstate Commerce Commission, or is an actual physical connection by bringing a track to the right of way of the road sought to be connected, the result is the same. Both constitute an extension of the latter road to an industry not on its line" (C. C. C. & St. L. Ry. Co. v. Commerce Commission, 315 Ill. 472) (II-E [b], Brief, p. 78).

On this subject the vice-president of appellee, when the question was squarely put to him, said:

> "It is true that if we had a reciprocal switching arrangement with the Big Four between the Big Four and the Illinois Central from the connection at Eldorado, to our mine, we would have all that we are contending for in the construction of this track" (R. 219).

It thus appears that the appellee has obtained through the Interstate Commerce Commission the very thing which the Commission held it was not entitled to have, because to grant it would be the equivalent of requiring appellant to extend its rails to appellee's mine, and appellant as appellee is situated owes it no duty as a common carrier.

Appellant's Track Is Not a Sidetrack as Alleged by the Complaint (II F, Brief, p. 81)——The evidence does not bring this track within the description of the word "sidetrack" as that term is understood in common usage. What is a sidetrack? Is a lateral branch line a sidetrack? Is a spur extending from an industry on one railroad to another a sidetrack? Is a track constructed with 85-pound rail, creosoted ties and rock and cinder ballast, first-class bridges and in every way the equivalent of the main track of the Illinois Central and appellant what is meant by the word "sidetrack"? Is a track built for the transportation of freight and passengers, the extension of spurs into new territory, the use by the public on either side of it for the location of industries and to be used

for the traffic of three railways, what is understood by the term "sidetrack"? Is a track, whether or not subject to such uses in interstate commerce, but subject to such uses in intrastate commerce, a sidetrack? Is a track laid across three public highways and two railroads by a corporation having no authority to lay it, existing in violation of the plain statutes of the State of Illinois prohibiting its location, a sidetrack within the meaning of this statute? Is a track unlawful in its conception, design and construction a sidetrack? Can this Court endorse the conclusions of the Interstate Commerce Commission and the three judge court that a track which can alone be constructed or maintained under the authority of the State of Illinois and has been condemned as unlawful by the court of last resort of that state, is such a sidetrack as Congress intended to authorize a connection with by Paragraph 9 of Section 1 of the Interstate Commerce Act? We think this Court must conclude that the Commission and the Court are both in error in holding that it is, as a matter of fact, a sidetrack within the meaning of Paragraph 9. The evidence shows conclusively it is not and never was intended to be a sidetrack (supra, page 45 [4]). What is and what is not a sidetrack and the distinction between a sidetrack with which the Interstate Commerce Commission may order a connection and a connecting railway, or an extension of railways, is a question depending somewhat upon the facts of each case. The Supreme Court of Illinois said: "Each case must rest largely upon its own

facts" (II-F-[a], Brief, p. 71). But, neither Commissions nor courts have the power to arbitrarily disregard evidence which conclusively establishes facts, nor to find a fact as an inference from evidence which does not tend to prove the fact found. That is precisely what the Commission did and what the District Court has approved. The evidence to which we have just drawn attention does not tend in the slightest degree to establish that this track is a sidetrack even if the uses to be made of it in the mining business of appellee be exclusively considered. This would be the operation intended—cars could be taken from the assembly yards to appellant at Harrisburg in trains a distance of three miles and a half to the connection, thence three miles over this track and spotted at the mine of appellee. When loaded, upon notice, appellant would bill the cars to destination on a single through rate, including the entire charge for spotting and transporting the cars. They would then be taken to appellant's assembly yards at Harrisburg, classified and sent out on trains. This operation would only be varied according to the plans of appellee by the cars being delivered to either the Illinois Central or the Power Company at the connection, thence taken to the mine, located and returned to the connection, in either of which cases the appellee would pay an interline switching charge. In that event there would be a separate railroad service performed by a separate and distinct railroad, and it would in all respects be equivalent to a connecting line movement of coal in

transportation to destination from the mine to the connection. The movement would be precisely the same as if the cars were delivered to the Illinois Central at the Eldorado connection and treated in like manner. The cars would at no time stand on this track as a sidetrack. It would be kept open at all times as a main track and the three railroad companies would be compelled to keep in touch with each other to effect its joint use, as contemplated by the contracts under which it was built. If it should be said in answer to this contention that the Interstate Commerce Commission has not authorized such uses of the track the reply is that the Constitution and laws of the State of Illinois, if the track is to be used mandatorily, require that it be so used in intrastate commerce, and since group rates apply from these mines to all Illinois markets without reference to the number of railways over which the traffic may be carried, all coal produced at this mine could be routed over appellant's line to its end at Danville and delivered to the C. & E. I., thence into Chicago, and thus 9 per cent of the product of that mine be carried over this track. We insist that whether this track is a sidetrack or a connecting railway depends as much upon its intrastate as its interstate uses, and the intrastate uses of the track, its connection and maintenance, the losses which may result from its operation, either directly to the public or indirectly to appellant are as much a matter of national concern, if that result comes through intrastate operation, as through interstate operation. We have

already shown that the authorities establish beyond question that a key to a determination of the character of this track is furnished by Paragraphs 18 to 22 of Section 402 of the Transportation Act (now Section 1 of the Interstate Commerce Act), and that both the courts of Illinois and this Court have held that the determining factor is the result which would come from the use of the track; that if it causes a duplication of construction, maintenance and operation or affords a means of competition it must be regarded in law as a connecting railway or an extension of railways. Under this division we have again cited the cases to which we heretofore drew the attention of the Court (II-F, Brief, p. 81).

Appellee's Track Was Built as an Interstate Railway Without a Certificate of Public Convenience and Necessity to Be Operated by the Illinois Central, the Power Company and Appellant (II-G, Brief, p. 84).——We think we have shown that this track is not a private track. The facts upon which we rely to establish that contention also establish that it is an interstate railway and an extension of railways with which it is and shall be connected. In its report the Interstate Commission assumed, contrary to the fact, that we predicate our contentions as to the character of this track solely upon the contracts under which it was built. That is not correct. We base them upon all the facts to which we have drawn attention and the law as well which defines what is meant by the

words "private sidetrack." The Commission intimated that if either the Central or the Power Company should attempt to operate this track in interstate commerce it would have to come to it for a certificate of public convenience and necessity. We have searched the cases in vain for any authority that would justify such a construction of the law. The statute requires a certificate of public convenience and necessity before undertaking the construction of a new track to be used in interstate commerce. The theory of the Commission seems to be this: "Here is a track which under the laws of Illinois could not be built. It was built to be used in interstate commerce to be connected with interstate railroads and used by them. We will disregard the intent for which it was built We will disregard the want of legal authority to build it. We will disregard its legal character as an interstate railroad. We will disregard that the complainant is not a shipper on the railway of respondent. We will disregard that the track, whether a spur track, sidetrack, lateral branch line, an extension of railways or a connecting railway, is a public track. We will disregard that because of its location, construction and intended uses under the laws of Illinois it is a public track. We shall assume for the purpose of compelling respondent to comply with the demands of complainant that the complaint is made by a shipper in interstate commerce. We will consider that his intention to ship in interstate com-

merce after he has had the aid of this Commission is sufficient to give him the present status of a shipper in interstate commerce on the railway of respondent. We will consider that the track is a private sidetrack, though if a private sidetrack its construction and abandonment are subjects exclusively within the jurisdiction of the courts of Illinois, and that the Supreme Court of Illinois has held that it is unlawful and must be abandoned. We will assume that it is a sidetrack, though it has no resemblance in construction, location or intended uses to what has heretofore been understood to constitute a sidetrack. We will assume that as complainant is located, respondent owes him the duty of a common carrier, though we have heretofore held that respondent owes to it no such duty. Notwithstanding we have heretofore held that to require respondent to give service to complainant's mine located on the railway of the Illinois Central two miles and a half from the railway of respondent would be to require respondent to extend its railway to complainant's mine, and that we have no authority under the law to do that, we will under the present circumstances forget our conclusions on that occasion. What we will do is to order the connection and if the track shall hereafter be operated as the parties intend in interstate commerce if complaint shall be made to us we shall *then* enter an order requiring those who attempt to operate it in interstate commerce from doing so, but all this time we will keep the track connected with the railways

as ordered, notwithstanding to maintain the track with such a connection would constitute it an unlawful track in violation of the Constitution and laws of the State of Illinois. In other words, notwithstanding the State and Nation are associate sovereignties each supreme within its jurisdiction, and notwithstanding the jurisdiction of Illinois exclusively covers the construction and maintenance of this track, yet because we have authority to order a switch connection with a track which *may be built* we will assume that Congress by the words '*may be built*' means that if the track is physically built no matter how built or whether it can be maintained Congress authorized the co-ordinate sovereignty, the United States, to aid the malefactors who built this track in violating the law of the sovereignty, Illinois, which the Constitution requires us to protect when acting within the scope of its jurisdiction." We submit that this attitude of the Commission is directly in conflict with the decisions of the Supreme Court of Illinois and of this Court; that if it is possible by evidence and authority to establish that a particular construction is a connecting railway and an extension of railways, the evidence and the decisions of the Supreme Court of Illinois and of this Court establish that such is the character of this track. We have cited and quoted elaborately from the authorities to which we have already drawn attention in the corresponding division of our brief to which we invite the consideration of the Court (II-G, Brief, p. 84).

Appellee's Track With Respect to Interstate Commerce Is a Public Track and Part of the Railway Systems of Illinois (II-H, Brief, p. 100).———In discussing other phases of this case we think we have satisfactorily shown that aside from the use of this track as an interstate railway it is a public track; that if it shall be maintained connected with the railway of appellant it will be a part of the intrastate railway system of the State of Illinois. We now insist that it maintains the same public charter in its relation to interstate commerce, that if the public has the right to use it in either interstate or intrastate commerce, or the right to use it regardless of either, it is a public and not a private track. The great concern of appellee when authority was obtained from the Illinois Commission to build this track and a petition filed to require its connection was the benefits that would come to the appellee and its associates in the use of the track in intrastate commerce. A reference to the record will show that throughout the proceeding it was insisted that appellee desired the markets located on the Big Four in Illinois. It desired to compete with the mines upon appellant's railway on equal terms as though its mine were located thereon, and obtaining a facility to enable the Illinois Central to invade appellant's coal field was emphasized as a paramount object. It was pointed out in that case that from 85 to 90 per cent of the coal from that territory was transported to destination in intrastate commerce. It was alleged appellee suffered a disadvantage in reaching

those intrastate markets. When it was pointed out that appellant's railway did not extend to Chicago and that its regular route of transportation is intrastate, it was replied that a connection at Danville with the C. & E. I. would complete an intrastate route over appellant's railway to Chicago and that the rate would be the same as charged local mines on appellant's road over the regular interstate route. So, if this track shall be used in intrastate commerce, as originally intended, then the effect both upon the appellant and the public would be substantially the same as if operated in interstate commerce. That would be accomplished through the friendly offices of the Federal Government and in violation of the Constitution and laws of the State of Illinois. We are aware that the Constitution and laws of the State of Illinois in face of Federal jurisdiction are mere waste paper, but the Federal statute and this Court have established beyond the possibility of doubt that the construction and maintenance of this track, if a private sidetrack as found by the Commission, are within the exclusive jurisdiction of the State of Illinois. It is only by the contention that a mere incident of a track connection within the jurisdiction of the Federal Government the grant of exclusive jurisdiction conferred by Congress may be withdrawn. It is our contention that no such construction of the law is allowable. The incident never gives color to the principle thing, but the principle gives color to the incident. The connection does not make the track, the track is merely

made useful by the incident—in connection. The *private* sidetrack must exist before the connection can be required. No private sidetrack did exist. It must have been a private sidetrack which "*may be constructed.*" The Federal Government cannot at the same time say that it is a track which may be constructed and recognize the authority of the state to say whether or not it "may be constructed." There was no permission under the laws of Illinois to construct this track. Aside from these considerations would not this track operated in intrastate commerce violate the policy established by the Transportation Act? Paragraph 9, and Paragrapns 18 to 22 of section 1 of the Interstate Commerce Act are laws in pari materia. The former existed in its present form when the latter was enacted by the Transportation Act. It follows that in construing the two classes of provisions together the Transportation Act must be regarded as a modification of the preexisting provisions contained in paragraph 9. This Court has held that the Transportation Act completely changed the policy in relation to railroads, and that while previous to its enactment regulation of rates by competition and the construction of new railways, lateral lines, spurs and sidetracks to promote competition was a legitimate exercise of railroad power, that policy has been changed by the Transportation Act and now the key to a construction of these provisions in connection with each other is the intent of Congress by the later law to establish a new policy prohibiting duplica-

tions of railway lines and extensions and tracks built for the purposes of competition, the design being to foster and protect existing railway systems and prevent ruinous duplications and competition, the losses of which ultimately fall upon the public. A track, therefore, built to effect the objects sought to be prohibited by the Transportation Act is in plain violation of the new policy established by that act and is a matter which should have had the consideration of the Commission and the three-judge court, although the injurious effect is sought to be accomplished through operations intrastate as distinguished from interstate commerce. The record shows that at least 90 per cent of the coal shipped from this district reaches destination in intrastate transportation. Tracks built for the transportation of coal from this district are, therefore, built for use in intrastate commerce. The duplication of new tracks and extensions constructed for that use by an interstate railway or to be used by an interstate railway in intrastate transportation would, therefore, cause the same losses to interstate railways from duplication and the construction of competitive lines as though they were constructed for use exclusively in interstate transportation. So, such construction was intended by Congress to be prohibited without a certificate of public convenience and necessity from the Interstate Commerce Commission. If it should be held that such duplication, additional capitalization and competition can be maintained by interstate railways in intrastate operation, then

the railways of the country, with the permission of the several states, would undoubtedly be able to evade and practically nullify and defeat the policy of Congress in enacting paragraphs 18 to 22 of section 1. No construction of these provisions is allowable which would nullify the paramount object of Congress as defined by this Court (II-H, Brief, p. 100).

Appellant's Track Considered Merely as a Sidetrack Connected with a Public Railway Is Not a Private Track (II-I, Brief, p. 101).——We have discussed various aspects of this track as public and private or as a connecting track or an extension of railways, but have not discussed it as purely a sidetrack regardless of whether it is to be used in interstate or intrastate commerce. If it be assumed that it is a mere sidetrack, as that term is ordinarily used and understood, to be used by a shipper exclusively in the transportation of coal from a mine on the railway with which it is connected, it is as to the public and the railway with which it is connected a new facility of the railway company which could not be constructed without a certificate of public convenience and necessity. Section 55 of the Public Utilities Act of Illinois provides:

> "No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or in extension thereof or in addition thereto, unless and until it shall have

obtained from the Commission a certificate that public convenience and necessity require such construction" (1925 Cahill's Ill. Stat., Chap. 111a, Sec. 55, p. 1902) (II-I-[a], Brief, p. 101).

As we have previously shown from the citation of authorities, it is an established doctrine in Illinois that any track connected with a public railway becomes a public track if it is so located and situated that it can be used generally by the public. We have shown by the evidence that this track is so located and situated. It extends through the lands of a large number of landowners who might locate industries on both sides of it its full length. Spur tracks might be extended from it into the extensive coal fields lying both east and west of it in Saline County. Wye connections with the main tracks of the Illinois Central and the Power Company would give them the free use of it. It is located across three public highways. Therefore, under the decisions of the Supreme Court of Illinois it is not only a public track, but with respect to the public and the railways with which it is connected it is the track of such railways and a part of their railway systems. It makes no difference that the title to the track may be in the appellee, nor that the appellee may have constructed it and now owns it (Public Utilities Commission v. Smith, 298 Ill. 159; St. Louis, Springfield & Peoria Railroad v. Illinois Commerce Commission, 309 Ill. 621; C. C. C. & St. L. Ry. Co. v. Illinois Commerce Commission, 315 Ill. 461).

Whether it is a public track or a private track considered merely as a facility of the Illinois Central or appellant, or both, is a question exclusively within the jurisdiction of the sovereign State of Illinois, and its Constitution, laws and the decisions of its court of last resort that it is a public track.

Appellee Is Estopped to Deny the Facts and Conclusions Found by the Supreme Court of Illinois (II-J, Brief, p. 102).———Appellee first applied to the Illinois Commerce Commission to coerce a connection between its new track and appellant's railway. The proceeding before the Illinois Commission was under an Illinois statute substantially like paragraph 9, Section 1 of the Interstate Commerce Act. It involved a consideration by the Illinois Commission of the question of jurisdiction, that is, whether the matter was one of which the Interstate Commission or the Illinois Commission had exclusive jurisdiction. By the provisions of paragraph 22 of section 1 it was clearly a matter not within the jurisdiction of both commissions. Appellee elected to first apply to the State Commission and accordingly invoked the exercise of its jurisdiction, and all the questions, both of law and fact, here involved were there presented and subsequently adjudicated to a final conclusion in the court of last resort, the Supreme Court of Illinois. The final judgment of that Court stands unreversed and unchallenged. While that case is not this case, that is, there is not an absolute identity of the two

cases, because the proceedings were in different jurisdictions under slightly different statutes, the parties are the same, the issues the same, the relief prayed the same and the material facts identical growing out of precisely the same transactions. The records in both cases were before the Interstate Commission. The final adjudication of the Illinois case was pleaded as an estoppel in the bill and the allegations sustained by the proofs. In such cases the doctrine of estoppel applies. On this subject Bigelow says:

> "The class of cases now to be considered is that in which an estoppel arises regardless of any identity in the cause of action; the only requirement now being that the point in issue, as distinguished from the whole cause of action, shall be identical in the two cases. In these cases the judgment operates as an estoppel in regard to those matters in controversy, upon which, or upon the determination of which, the verdict or finding, as distinguished from the judgment itself, was rendered."

This rule is applicable to the decisions of boards, commissions and courts of limited and special jurisdiction and to the decisions of public officers required to exercise judgment and decide issues (II J-[a], Brief, p. 102). "A judgment at law in any form of action is conclusive upon the parties upon all questions, tities and rights involved in the litigation and passed upon by the Court, which the Court had power and jurisdiction to hear and determine,

and nothing more; and when the same questions or the same rights or titles are again drawn in issue, whether in a court of law or equity, between the same parties or their privies the previous adjudication will be regarded as conclusive upon them" (Hawley v. Simons, 102 Ill. 115). "When some specific question has been adjudicated and determined in a former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit without regard to whether the cause is the same in both suits or not. This is known as an estoppel by verdict and is equally available to the plaintiff in support of his action when the circumstances warrant it, as when offered by the defendant as a matter of defense" (Hannah v. Read, 102 Ill. 596) (II-J-[c], Brief, p. 103). This rule was applied by this Court in Cromwell v. Sac County, 94 U. S. 350, 24 L. ed. 198 (II-J-[d], Brief, p. 104). That the decision of a state court relates to rights sought to be exercised under a grant from the Federal Government would make no difference (Stone v. Southern Illinois and Missouri B. Co., 206 U. S. 269, 51 L. ed. 1059) (II-J-[e], Brief, p. 106). This rule is applicable as between the jurisdiction of the state and federal courts, in pursuance of Section 1, Article IV of the Constitution of the United States, which provides:

> "Full faith and credit shall be given in each state to the public acts, judicial records and proceedings of

every other state, and Congress may, by general law, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof" (II-J-[f], Brief, p. 107).

The courts of the United States are bound to give the judgments of state courts the same faith and credit that courts of one state are bound to give to the judgments of courts of another (Cooper v. Newell, 173 U. S. 567, 43 L. ed 812; Wisconsin v. Pelican Insurance Co., 127 U. S. 291, 32 L. ed. 239) (II-J-[g] and [h], Brief, p. 107). The Supreme Court of Illinois settled all the issues of fact involved in this case in favor of appellant. (No question of jurisdiction was involved.) The record in evidence, to which we drew attention in stating the issues, shows that the same questions of law and fact involved here were raised by the assignment of errors in the Supreme Court, and the opinion of the Court and the judgment of reversal show that the same questions were involved in the issues and decided (R. 452-473).

The three judges sitting in the District Court should have applied the rule of estoppel and followed the conclusions of the Supreme Court of Illinois upon the questions of fact decided by that Court in adjudicating the order of the Illinois Commission.

The Order of the Interstate Commerce Commission Requiring Connection With Appellee's Track on the Theory That It Is a Private Sidetrack Is Not Only Contrary to Law But in Violation of a Penal Statute (II-K, Brief, p. 109).———It is but a matter of inspection to ascertain that Paragraph 9 of Section 1 of the Interstate Commerce Act had not been changed or modified since its enactment many years ago. It has been carried in various editions of the federal statutes without modification. However, by the enactment of the Transportation Act, it was amended and limited in its operation so that no order can be entered under it which conflicts with the spirit and intent of the statute as defined by the federal courts (Detroit & Mackinaw Railway Company v. Boyne City Ry., 286 Fed. 540; Railway Commission v. Southern Pacific R. Co., 264 U. S. 331, 68 L. Ed. 713, at 764; Texas & Pacific v. Gulf, Colo. & S. F. R. Co., 270 U. S. 277, 70 L. Ed. 583; Western & Atlantic R. Co. v. Georgia Public Service Commission, 267 U. S. 493, 497, 69 L. Ed. 757). The same policy established by these authorities prevails in Illinois (Choate v. Commission, 309 Ill. 256).

Section 55 of the Public Utilities Act prohibits any utility from beginning the construction of any new plant, equipment, property or facility without first obtaining a certificate of public convenience and necessity.

Sections 76 and 77 of the same act provide severe penalties for beginning the construction of any such new

plant, equipment, property or facility without such certificate.

Paragraph 18 of Section 1 of the Interstate Commerce Act provides that no railroad company shall undertake the extension of any line or the construction of any new line of railroad without first obtaining a certificate of public convenience and necessity, and paragraph 20 of the same section provides a penalty of five thousand dollars for any construction, operation or abandonment of a railway contrary to the provisions of paragraphs 18 and 19. So, it is very plain that the order of the Commission is in direct violation of the penal provisions of the Illinois Commerce Law or the Interstate Commerce Act (II-K-[a]-[b]-[c]-[d], Brief, pp. 109-111).

Rightfully construed there is no antipathy or conflict between state and federal laws on this subject. Indeed such a conflict could not exist. In any field occupied by a federal statute, or by the Federal Constitution without a statute where the provision is plenary and self-executing, the federal provision is the supreme law of the land and excludes all authority in the state to legislate, but where a federal statute yields to the jurisdiction of a state in a matter not excluded from state jurisdiction by the Federal Constitution, state jurisdiction is equally exclusive and supreme. The reason for yielding to the state's jurisdiction of side, spur and industrial track construction and discontinuance was fully explained by the opinion of Chief Justice Taft in the case of Railroad

Commission v. Southern Pacific Company, 264 U. S. 544, in which he said:

> "One might, too, readily conceive of railroad crossings or connections of interstate carriers in which the exercise by a State Commission of the power to direct the construction of merely local union stations or terminals without extensions of main tracks and substantial capital outlay should be regarded as an ordinary exercise of the police power of the state for the public convenience, and would not trench upon the power and supervision of the Interstate Commerce Commission in securing proper regulation of an interchange of interstate traffic or passengers. Only a lawful order of the Interstate Commerce Commission would raise a question of the power of a State Commission in such cases, as the proviso of Par. 17, Sec. 402, of the Transportation Act, shows; • • • But there is a great difference between such relocation of tracks or local union stations and what is proposed here. The differences are more than that of mere degree; they and their consequences are so marked as to constitute a change in kind. They come within Pars. 18 to 21 of Sec. 402, and require a certificate of the Interstate Commerce Commission **as a condition precedent** to the validity of any action by the carriers, or of any order by the State Commission."

In the later case of Western & Atlantic v. Georgia Public Service Commission, 267 U. S. 497, 70 L. ed. 756, the same Justice directly construed the intent of Congress

to be the giving of exclusive jurisdiction to the states under the proviso contained in paragraph 22, and held that the contention that the track under construction would be used 85 per cent in interstate commerce would have no bearing.

These reasons apply and were held to apply with equal force whether the sidetrack is used partially or wholly in interstate commerce. The reason why this Court held that the degree or extent of use of the track for one or the other does not determine whether it is or is not subject to state or federal jurisdiction is that no such test was prescribed by the Act of Congress. This principle applies also to the other provisions of the Transportation Act the same as to paragraph 22 of section 1. For instance, if an interstate railway should be extended a certificate of convenience and necessity would be required from the Interstate Commerce Commission before undertaking the extension and it would make no difference that the extension would, when complete, be used exclusively in intrastate commerce. Nor would the rule change because the extension would lie wholly within a single state and be an extension of the railway lying wholly within a single state. That the extension might injuriously affect a railway corporation engaged in interstate commerce and that such injury might be passed on to the public, thus violating the public policy declared by Congress would be sufficient to warrant an application for a certificate of pub-

lic convenience and necessity or authorize the restraint of the undertaking without such certificate. The language of Chief Justice Taft, quoted from the Southern Pacific case, supra, shows clearly that the certificate in that case must precede the undertaking, but we should again note that in this case the Interstate Commerce Commission reserved a consideration of whether a certificate should issue until operation shall begin. It also held that the contracts which provide for the operation of this track in interstate commerce as parts of at least two interstate railways is not indicative of the character of the track. That holding is quite in contrast with the position it took in the case of the application of the Southern Illinois & Kentucky for a certificate of public convenience and necessity (People v. Illinois Central R. R. Co., 324 Ill. 599). The Illinois Central projected a cut off to be constructed from the main line of its Chicago-New Orleans railway departing at Edgewood and reconnected at Fulton, Kentucky. It caused to be organized the Southern Illinois & Kentucky, an Illinois corporation, to construct from Edgewood to Metropolis, on the Ohio River. The officials of the Illinois Central applied to the Interstate Commerce Commission and represented that it would, when constructed and put in operation, carry interstate commerce. This was regarded as entirely adequate to warrant the Commission in assuming jurisdiction and granting a certificate of public convenience and necessity, and the Supreme Court of

Illinois held that such assumption of jurisdiction and order of the Commission so acquired and made divested the State of Illinois of all jurisdiction and authority over the construction of the railway, though when constructed the power will still reside in the Illinois Central if it choose to operate this branch exclusively in intrastate commerce. On the other hand, the connections and uses of appellee's track must be by interstate railways if operated at all, and the contracts under which it was built provide for its use in interstate commerce.

We have endeavored to point out the misconceptions of the record, the misapplication of the authorities and the inconsistencies of the order of the Interstate Commerce Commission in treating this case as one merely of a denial of service to a shipper on appellant's railway, and of the District Court in approving the order of the Commission. The errors are so outstanding that we can reach no other conclusion than that the action of both Commission and Court resulted from a misapprehension of the questions involved, and the views voiced that appellant was under duty to give requested service to "anybody, anywhere and under all circumstances." This was manifestly a wrong premise from which to give a correct consideration of this record and deduce a result in accord with the decisions of this Court.

We respectfully submit that the decision and decree of the District Court dismissing the bill for want of equity

should be reversed and the orders of the Interstate Commerce Commission held to be null and void and set aside.

All of which is respectfully submitted.

GEO. B. GILLESPIE,
Attorney for Appellant.

Of Counsel:
H. N. QUIGLEY,
S. W. BAXTER.

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No. 95

In the
Supreme Court of the United States

October Term, 1927

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Appellant

v.

United States of America, Interstate Commerce Commission and J. K. Dering Coal Company.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY BRIEF FOR APPELLANT.

BRIEFS TO WHICH REPLY IS MADE.

Three separate briefs have been filed for the Appellee. We deem it appropriate to reply to but two of them in view of the present state of the argument. We shall reply briefly to the brief of J. K. Dering Coal, and to that of the Solicitor General.

BRIEF FOR J. K. DERING COAL COMPANY.

This brief does not purport to cover the points discussed in the brief of appellant. The issues are stated from the standpoint of the Coal Company, parts of the record are not stated and some misleading statements appear in the argument. These we shall review. The issue is thus stated:

> "Is there power, State or National, to compel the railroad in its capacity as a common carrier to expend $2,000.00 and thus provide for Dering's 3,600 acres of coal land the same or similar transportation facilities which the carrier provides for the 39,000 acres of competitive coal lands owned by the railroad?"
> (Coal Co. Brief p. 3.)

Obviously the Coal Company already has equal facilities. Both are upon a single railroad under control of the same commissions empowered to compel adequate service and undiscriminatory rates. The question really involved is not this at all. It is neither a question of State or National power but whether that power has been invoked by satute. Whether the railroad company owns coal lands is not here involved, and that suggestion does not answer either the argument of appellant or the authorities cited to sustain it. If the Coal Company were in the same situation as other

mines located on appellant's railway it would then be in position to require the same car service, but not being in that position the suggestion, we submit, is irrelevant. The power to compel appellant to expend any money to promote the Coal Company's business or supply it cars located on another railroad three miles away does not exist. State and Federal power is only exerted to promote the general welfare and in construing the statutes here involved that must be the key to interpretation. What is for the general welfare and what provision has been enacted to promote the same must be the inquiry. After all, therefore, it is a question of interpretation of the statutes of the United States and their application to the situation shown by the evidence rather than one of relieving the Coal Company from the inconvenience of a location voluntarily chosen. If the Coal Company had a track "which may (lawfully) be constructed" and the track constructed had been such a track as is contemplated by paragraph 9 of Section 1, of Title 49 of the United States Code, then the only question would be whether the connection would transgress the provisions of the Transportation Act and violate the paramount policy expressed therein by reason of the peculiar situation and objects sought to be attained under the contracts in evidence by this connection.

Counsel for the Coal Company have not addressed themselves to these questions.

It is said:

> "The sustaining of appellant's contention herein would enable the railroad to accomplish the unthinkable result of having successfully resisted an order of the Illinois Commerce Commission on the ground that the Interstate Commerce Commission had sole and exclusive jurisdiction of the question whether this connection should or should not be made, and also successfully resisting the order of the Interstate Commerce Commission on the ground that this identical subject-matter was dehors the jurisdiction of the Federal Commission." (Coal Co. Brief p. 4.).

It is true that the Supreme Court of Illinois rightfully held, that the tracks constructed for the purposes and uses indicated by the contracts in evidence and to which under Illinois law they would have to be devoted in intrastate commerce, makes them a connecting railway and an extension of the railways, and that these facts give character to the tracks, but that was not the only question involved and decided by the Illinois Supreme Court. Two railroad tracks and four public highways intervened between the coal mine of the Dering Company and the railway of appellant. The Interstate Commerce Commission, we think, rightfully, disclaimed any jurisdiction over the construction of the track if it is a side-track. Its con-

struction and maintenance, therefore, is a matter within the jurisdiction of Illinois, if it is, and the Supreme Court of Illinois held that the Coal Company could not construct or maintain private side-tracks over highways and railways even with the consent of the Illinois Commission, and that a railroad company could not construct a track so located without a certificate of public convenience and necessity from that Commission, so although this court may hold the track is not a railroad or an extension of railroad the question remains whether jurisdiction conceded by the Federal law and the Federal constitution to a sovereign State will be recognized by Federal courts where the exercise of State power concededly does not contravene the granted power of the Nation. If this court should decide that the State Court has erred in holding that the construction and maintenance of these tracks are not matters within Federal jurisdiction as held by the State court, then it necessarily follows that it is a matter within State jurisdiction and that the tracks are unlawfully built, and the question would then arise whether the Federal courts should exercise their power to make a track connection with an unlawful track, whether paragraph 9, contemplates connection with an unlawful track or the words "which may be constructed" mean a lawfully constructed track.

Emphasis is placed on the prior negotiations ending in the construction of the existing tracks, the needs of the Coal Company's business and the lack of efficiency of Illinois Central Service. These things have no relation to the present discussion. We concede that as to all findings of fact properly founded upon probative evidence the finding of the Commission is conclusive. It is evident from the Commission's finding and from a concession of the brief of the Solicitor General that no such track as the one under consideration was ever contemplated in any negotiation between the Coal Company and appellant. He said:

> "C., C., C. and St. L. officials had no information at the time of the conferences that an attempt would be made to have the Illinois Central operate over this track and the right to extend spurs from it. (96 I. C. C., 146; R. 120.)"

Likewise in irrelevancy is the quotation from the letter of Mr. Stevenson of November 1, 1921, as follows:

> "If your company cares to construct and maintain at your expense a track from your mine up to our line we will be glad to effect connection with such track, *the point of connection, of course, to be designated by our operating department.*" (See Coal Company brief, p. 7.)

In this connection counsel for the Coal Company should also have quoted from two letters of the vice-president of appellant to show what point of connec-

tion was designated. In a letter to the vice-president of the Coal Company, dated October 22, 1921, the vice-president of appellant, Mr. Worcester, referring to the same matter mentioned in the letter of Mr. Stevenson of November 1, 1921, said:

> "I think you will find that he (Mr. Stevenson) answered your inquiry very completely. The substance of his interview was that the only way in which you could be served would be to have you build your own track at your own expense entirely from your mine to our main track *within the switching limits of Eldorado.*"

Again, on October 28, 1921, Mr. Worcester said to the vice-president of the Coal Company:

> "Your letter October 24, switching limits north of Eldorado are 3 miles from freight station and south 1.3 miles." (R. 13.)

This conclusively shows that such a track as was discussed was never built nor attempted, and that previous negotiations were not relied upon, and the Solicitor General in effect so concedes. This should dispose of the questions of estoppel and bad faith so persistently carried by innuendo throughout the argument of the Coal Company.

The argument that appellant defeated the exercise of State power upon the claim in the Supreme Court of Illinois (315 Ill., 461), that Congress had taken exclusive possession of the field and had committed the question here presented to the Interstate Commerce

Commission, and that we now seek to defeat the order of the Interstate Commission by the claim that it is a matter solely within the jurisdiction of the Illinois Commission, thereby endeavoring to lead this court to believe that we have changed our positions to meet the conditions of our case, misrepresents us. A reference to our briefs in the Supreme Court of Illinois and to the opinion of that court in the case cited will show that our position has been consistently that there was no power in the Coal Company to construct railroad tracks across a public highway and other railroad tracks because it is not a public utility; that in legal effect the construction of the proposed track, though at the expense of the Coal Company, would be to construct additions to the public tracks of the railway companies, and if the construction of such tracks is within the jurisdiction of the Illinois Commission then they cannot be constructed by the railway company without a certificate of public convenience and necessity from the Illinois Commission, which was never applied for; that if their construction is within the jurisdiction of the Interstate Commission by paragraph 18, then they cannot be constructed without a certificate of public convenience and necessity from the Interstate Commission, and that such certificates have not been obtained, so we have always insisted the track cannot be lawfully con-

structed or maintained. We have also argued from the beginning that these tracks are within the jurisdiction of the Interstate Commission because they are extensions of railways, and in reply to the position taken by the Interstate Commission that they are spur-tracks, we assert that, if spur-tracks, their construction and maintenance is by the Federal statute conceded to the jurisdiction of Illinois, and, therefore, in any possible phase of this case the tracks are unlawful; and, that to order a connection between them and the railway of appellant was to recognize and give force to that which is in violation of law. We have always urged that it is the duty of both State and Federal courts to apply the law of the other jurisdiction when applicable to a pending case and not inconsistent with the law of the jurisdiction in which the court sits. The application of these fundamental principles in the instant case would result in the Coal Company not being entitled to any relief in any court, because of its location, the objects which it seeks to attain and because the methods through which it seeks to attain them are contrary to law.

A number of cases were cited to show that the Interstate Commission has applied paragraph 9 of section 1 of title 49 since its enactment in 1906. The cases cited were all decided before the enactment of the Transportation Act and, therefore, can have no application to the questions arising upon the construc-

tion of paragraph 9 in connection with paragraphs 18-22 of section 402 of the Transportation Act.

We are misrepresented in the assertion that we claim that paragraph 9 or (G) of section 1 was amended in a broad sense by the enactment of the Transportation Act. It was permitted to stand but limited to the extent that the establishment of an entirely new policy by the enactment of the Transportation Act has limited it as held by this court in the case of Texas & Pacific v. Gulf, Colo. and S. F., 270 U. S., 266, and the cases cited in the opinion in that case. In that case this court said:

> "A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity and conservation of the financial resources of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; *that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival it may be the public*

which ultimately bears the loss." (Brief of Solicitor General, p. 16.)

It is true, as said on page 13 of the Coal Company's brief, that there is not involved in this proceeding an application to operate this track, but the contracts, nevertheless, give it character, and as shown by the decision of the Supreme Court of Illinois (315 Ill., 361), if connected it would immediately become a part of the railway highway of the State in intrastate transportation, as shown by the evidence, and available to 85 per cent of the coal transportation from that territory. So, its connection would establish the competition which this court said in the Texas and Pacific case may result in harm to the public by enabling appellant's strongest competitor to invade a coal field upon which it is solely dependent to sustain a capitalization of more than $20,000,000.00; and that in conflict with the policy established by the Transportation Act.

We do not dispute the authority of the United States v. New River Co., 265 U. S., 533, but it has no application here. In order to determine whether the Commission's order violates the constitution or exceeds the power delegated by statute, or is an exercise of power so arbitrary as virtually to transcend the authority conferred, it is necessary for this court to examine the facts and determine whether such is the

case. Out of the facts the law arises, and when the Commission says by its report that a thing is law or not law this court is not bound by that expression. The difficulty with the Commission was that it declined to express itself, as we contend, upon vital questions of law, but set them on one side and evaded them. We cite an example. Notwithstanding the Commission was apparently convinced that this track was built to be used in general transportation as a connecting railway and railway extension, it evaded the issue by saying that question might be considered when the operation of the track in interstate commerce should be undertaken, thereby ignoring the express language of paragraph 18, section 1, title 49, which requires a certificate of convenience and necessity before the construction of such a track may be *undertaken*. The embarrassment of the Coal Company, if it is embarrassed, resulted from its failure to comply with that express mandate. The Commission also stated that it was not concerned with what use might be made of the track in intrastate commerce. In view of the policy introduced by the Transportation Act, that was a question which it could not properly evade, for if through operation in intrastate commerce that policy would be violated, that the violation might occur under the guise of intrastate commerce would make no difference. As stated by appellees, the power of

the Federal government is adequate to enforce its statutes, and public policy as declared thereby, though intrastate commerce be limited or restricted. In other words, the railways of the county are National agencies and not State agencies, and the Supreme Court of Illinois so held in accord with the views of this court. The cases cited to establish that upon a question whether the courts of the United States have the right to determine whether the constitution or a statute of a State violates the contract clause of the Constitution of the United States may be determined by the independent judgment of the Federal courts, can have no application here because there is no such situation shown by the record. Moreover, we have not asked this court, in construing Federal law, to follow State decisions. The limit to which we have gone is that if Federal statutes concede State jurisdiction by a proviso then within the State jurisdiction the Federal courts will follow State law. To hold otherwise would be not to follow the express mandate of Congress ceding State jurisdiction.

Counsel for the Coal Company misconstrued our position in saying that we frequently reiterate in argument that the acquisition by the Dering Coal Company of title to the 60-foot strip of land and the laying of a railroad track thereon is beyond the charter power of the Coal Company. If the Coal Company

could acquire a private right of way from Cairo to Chicago and lay a track on it for its private use without laying it upon a public highway, a public street or across public railways, there can be no doubt of its right to do so. What we contend is that the Coal Company by its charter has no power to do what it has done in this case, construct a railroad across public highways and public railways without lawful authority from the State of Illinois, and that such authority cannot be granted by the Public Utilities Commission to a private corporation. The Illinois Court so held and no authority has been cited to the contrary. The cases cited upon this question (Coal Co. brief, p. 17) do not meet our position and do not establish that the railroad was lawfully built. Section 55 of the Public Utilities Act expressly prohibits under penalty the construction of a track across railways and highways without a certificate of public convenience and necessity. (See Ill. Stats. Appendix.)

BRIEF FOR THE UNITED STATES.

In considering the allegations of the bill concerning the jurisdiction of the defendants, the Honorable Solicitor General evidently overlooked these words,

> "that all said three Illinois corporations are *citizens and residents* of the City of Chicago in the *Eastern Division* of the Northern District of the United States District Court of the State of Illinois." (R. 2.)

In stating the questions involved, some of the positions urged by our brief were omitted. (U. S. brief, p. 3.) We think these are necessarily in the case: (1) The policy established by the enactment of the Transportation Act; (2) whether the course pursued by the appellant in first submitting the status of this track to Illinois courts and the final decision of the Supreme Court of Illinois would operate as an estoppel in pais and prevent appellant from relitigating the same question through the Federal commission and courts without an appeal and reversal of the Illinois decisions.

In stating the facts concerning the agreement for reciprocal switching (U. S. brief, p. 7), the Honorable Solicitor General overlooked the following facts: (a) That the conditions of the agreement were not met by coal production until Federal control of railways; (b) that the agreement was not carried out because the Dering Company had disposed of its Mine No. 3, on the railway of appellant, when a time arrived that it could be carried out by the officials of the railway company after termination of Federal control; (c) that the petition in the Dering Mines case was filed before the Interstate Commission against the Director General during Federal control; (d) that the officials of the appellant entered into negotiations prior to the filing of the petition in the Dering Mines case as an

alternative to meet changed conditions and was unable to carry them out because, under stress of war, funds were not available for new construction. With these facts in mind, we venture he would not have advanced the facts stated as tending to establish bad faith and a basis for estoppel. (U. S. brief, p. 7.)

He undertook to recite in his brief (p. 9) the substance of the contracts. We think he quoted this matter from the report of the Commission. There can be no doubt about what the contracts actually contain. The Commission could not diminish them by partial statement in its report. So, in order to get their full import, we suggest that the court examine them in the record. (R. 97-109.) They provide for not only the things specified but also give to the Illinois Central complete control during the operation of the mine and provide that they may be acquired by it when no longer used under the contracts. It is apparent also that the contract with the Electric Company is for joint use with the Illinois Central subordinate to its rights, and the two contracts together show plainly that the intent was to establish not only a new transportation service over them, but to give access to the coal mines on the railway of appellant. The track constructed is fully described as a first-class railway track. (U. S. brief, p. 9.) The photographs in the record will show

more fully its character and that it is not a mere side or switch track.

On the subject of construction it is said:

> "The purpose which the two statutes (Par. 9 of Sec. 1, and the Transportation Act) were designed to subserve differ proportionately as the methods differ by which they may be enforced." (U. S. brief, p. 12.)

We may not understand what is meant by this statement. The two provisions are contained in the same statute. The Transportation Act was enacted after the provisions of paragraph 9, and how they could be separately construed and applied we cannot conceive. They are evidently statutes in *pari materia* and should be construed together so as to give as much effect to both as is manifested by the evident intent of Congress. The purposes of the two parts are, of course, widely different, but we do not understand that that difference furnishes a proportion between them which should be applied in construing either provision, or that it is a key to interpretation of legislative intent.

The statement that the appellant owns and is engaged in the development of coal lands and properties and desires to protect its own private enterprise is an assumption made by counsel for the Coal Company which the Honorable Solicitor General seems to have adopted from the record. (U. S. brief, p. 12.)

An examination of the evidence will not find any evidence of such a desire, but, on the contrary, shows that the carrier facilities of appellant have been fully open to the Coal Company at its connection with the Illinois Central in Eldorado upon equal terms with the shippers located on its railway under such rates and with such through routes as the Illinois Commission and this Commission shall prescribe. The Coal Company asked for but one joint rate and route, and got it without objection. (R. 217.) It also appears from the evidence that there are ample facilities in Eldorado for transfer from the railway of the Illinois Central to appellant's railway, and that if delivered at that point any surplus from Dering Mine which the Illinois Central is not able or willing to transport would be freely accepted and transported by appellant without discrimination and would not interfere with other traffic on its railway.

We accept the rule established by the decision of this court in the case of Texas and Pacific v. Gulf, Colo. & S. F., 270 U. S., 266, 278, in construing paragraphs 19 and 20 as sound law. However, it appears that counsel for the appellee have overlooked a very material part of the rule established, and that in construing paragraphs 19 and 20 the court held that they include and bring within their terms all new tracks

or extensions which may result in harm to the public, and that the new policy established by the Transportation Act requires it to be so construed as to harmonize with the theory of protecting railways already in the field in the enjoyment of the revenues which they have built up and preventing ruinous competition ultimately injurious to the public. Expressing this view it was said,

> "that property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources, and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit, and when a railroad inflicts injury upon its rival it may be the public which ultimately bears the loss."

Applying that rule of policy to a construction of these provisions in view of the evidence and the uncontradicted facts, here is a railroad rebuilt to carry coal traffic from the Harrisburg district at a cost of $20,000,000.00. Mines have been located upon it which give it a revenue sufficient to maintain this large capitalization necessary to construct, reconstruct and equip it. If that revenue should be diminished by ruinous competition sought to be injected by the construction and operation of these tracks, thereby giving access to the Illinois Central through the agency of a patron on its line and the selfish co-operation of the

Electric Company, a very serious financial loss would result to appellant, and if appellant should retaliate by like methods, which it might do if this can be done, a ruinous competitive fight would result and the public would ultimately be the victim. It is not an answer to this suggestion that the order of the Commission only relates to interstate commerce. Eighty-five per cent of the traffic from those mines goes to Chicago intrastate, and if this connection should be coerced and maintained the constitution of Illinois gives to such tracks a public character as a part of the railways with which they connect, and the thing which this court has said the paragraphs of the Transportation Act were designed to prevent would be accomplished in face of the public policy established by them.

We do not think it is a matter of significance that the shipper must be the moving party under the provisions of paragraph 9, of Section 1. The provisions of the Transportation Act are prohibitive and impose a penalty for a violation of paragraph 18 of not more than $5,000.00 nor by imprisonment of not more than three years, (Title 49, Sec. 1, Par. 20.), and any interested party has the right to interpose by injunction to prevent a violation of the section. This is surely a sign that Congress intended that this law should be observed and enforced and places it at least upon a parity with a provision giving a shipper a right to

have a side track under specified conditions. It established a new public policy, "*Salus populi suprema lex.*" We respectfully submit that the construction put upon this act by the Honorable Solicitor General is entirely too narrow and would not effect the public policy established by the Transportation Act. That the amendment of 1910 to paragraph 9, of Section 1, allowing a lateral branch line to file a complaint does not change the rule of construction, and it is certainly not contended that this track is a lateral or branch line. If it is, then being located across highways and other railways it would be a public railway and could not be built under Illinois law nor without a certificate of public convenience and necessity. The reasoning in the cases of Interestate Commerce Commission v. Delaware, Lackawana & Western, 216 U. S. 531, 537, and United States v. Baltimore & Ohio, 226 U. S., 14, 19, cited by the Honorable Solicitor General supports our contention. This Court there held that this paragraph, so far as it relates to lateral or branch lines, is intended to give shippers without transportation an opportunity to obtain it, and that would apply equally to them whether they seek to do so through a lateral branch line or through a spur, side or industrial track. The Coal Company is not in such a situation. It has a main line railroad through which it can reach the rails of appel-

lant within a shorter distance than through the track which it has constructed, the difference between the two being that the Illinois Central and the Electric line would not be able to invade appellant's coal field through that connection. (U. S. Brief, p. 18.)

On page 19, of his brief the Solicitor General says:

> "Counsel may not successfully maintain the Illinois Central and the electric line were without legal authority to grant permission to Dering Company to build its switch track across their tracks. A *fortiori*, as a consideration, why may not those companies impose reasonable conditions to their advantage without liability to themselves and without laying themselves open to the charge of undertaking the extension of their lines or the construction of new lines such as are contemplated by paragraphs 18 to 21? Illinois Central and the electric line presumably acquired some useful right for what they gave up and that was all that happened."

This is a recognition that there is difficulty in the position taken by counsel for appellee. The question arises how is the Coal Company to make its track available. The Coal Company cannot lawfully reach the right of way of appellant with its track because highways and railways intervene. This is shown by the Illinois statutes in the appendix to this brief. Those statutes also show that the Illinois Central and the electric company cannot reach it without a certificate of public convenience and necessity, so, it is

sought to evade by the contracts in evidence upon the theory of give and take. Apparently the Illinois Central and the electric company cannot confer a power by contract which they do not possess. Since the power to regulate the construction of this track is conceded by the proviso contained in paragraph 22, Section 1, Title 49, the decision of the Supreme Court of Illinois that neither the railway companies nor the Coal Company can construct and maintain this track must be deemed conclusive. Certainly this court will not accept the suggestion of the Honorable Solicitor General that the laws of Illinois may thus be evaded by contract.

We were criticised for saying that certain facts were practically admitted, and it is insisted that inasmuch as two reports were made by the Interstate Commerce Commission holding that the Coal Company had fulfilled the conditions of the statute we are not at liberty to discuss other admitted facts. Clearly counsel are in error. As we have shown in our brief, the Commission made no findings upon the facts presented by our defense and declined to say what effect the contracts should have, and naturally left all our contentions to the courts or postponed their consideration to some future proceeding. It treated those facts as entirely outside of the case. We insist that they are important and if our contention is right the Commis-

sion having made no finding thereon we are at liberty to point out what the facts show and ask courts to consider them. Moreover, where the facts are found, if those facts are not within the principles of laws as determined by this Court in construing the statutes, that the Commission found they were is not binding upon this court, but upon admitted facts this court is at liberty to apply its own construction and determine what the law is both as to construction and application. And the courts may also say what the law is as to found or unquestioned facts as an exercise of independent judgment.

As we have suggested, we do not rely upon Illinois law where it conflicts with Federal law, but we do insist that since by the proviso in paragraph 22 of section 1, title 49, Congress has excepted from the provisions of the Transportation Act the construction and abandonment of spur, industrial, team, switching or side-tracks located or to be located wholly within one State, it recommitted that power to the States, and that the character and status of a track of he kind specified consructed, maintained or abandoned under the provisions of the proviso must be determined by the law of the State where the track is located. If not, then the proviso was not effective to do what it undertook. (U. S. brief, p. 20.)

The inference stated by the Commission and argued by the Honorable Solicitor General that the fears of appellant of competition through future operation over this track by the Illinois Central in connection with the electric Company to the mines upon its railway is inspired by its ownership of coal lands, has no basis in the evidence. That it does anticipate what the contracts between the railway companies and the Coal Company, the conduct of those parties and the express declaration of J. Paul Clayton, vice-president of the Electric Company (R. 412-414), clearly show to be their design, we do not dispute. That is a present menace. Whether appellant does or does not own coal lands apparently does not bear in the remotest degree upon the construction of these statutory provisions and the application of the law thereto under the established facts. A track connection between the Illinois Central and appellant's railway within two miles of the Coal Company's mine is a clear demonstration that no discrimination could be wrought against the Coal Company, and the selling price of all coal is fixed in the consuming markets which can be reached by all on the same group rates. The power of the Interstate Commission and the Illinois Commission is adequate to require just rates and equal treatment for all shippers. That the competition in transportation which it is alleged appellant fears, and which

is in fact imminent, would be contrary to the policy established by the Transportation Act, this court has conclusively settled, and that is the vital question upon this branch of the case. The case of United States v. New York Central, 272 U. S., 457, is cited as having some similarity to this case in its history and nature. We have examined that case and find no similarity. In that case there was apparently a refusal of interchange of traffic and facilities between the Barge Line and the New York Central at their connection. In this there has been no refusal and but one use of the connection by the Dering, and the evidence shows that the track and station facilities of appellant at the connection are used jointly by the Illinois Central without let or hindrance.

We respectfully submit that, instead of meeting the issues presented by our brief, counsel filing briefs on behalf of the appellee have discussed irrelevant questions and failed to meet the issues.

GEO B GILLESPIE,
Attorney for Appellant

Of Counsel
H N QUIGLEY,
S W BAXTER

APPENDIX.

Section 55 of the Public Utilities Act, Cahill's Illinois R. S. 1927, p. 1981, provides:

"No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction.

"No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State and not possessing a certificate of public convenience and necessity from the State Public Utilities Commission or the Public Utilities Commission, at the time this Act goes into effect, shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

"Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity.

"Such certificates may be altered or modified by the Commission, upon its own motion or upon application by the person or corporation affected. Unless exercised within a period of

two years from the grant thereof, authority conferred by a certificate of convenience and necessity issued by the Commission shall be null and void.

"No certificate of public convenience and necessity shall be construed as granting a monopoly or an exclusive privilege, immunity or franchise."

Section 58 of the Public Utilities Act of Illinois, Cahill's Ill. R. S. 1927, p. 1982 provides:

"No public road, highway, or street shall hereafter be constructed across the track of any railroad company at grade, nor shall the track of any railroad company be constructed across a public road, highway or street at grade, nor shall the track of any railroad company be constructed across the track of any railroad or street railroad company at grade, nor shall the track of a street railroad company be constructed across the track of a railroad company at grade, without having first secured the permission of the Commission. Provided, that this section shall not apply to the replacement of lawfully existing roads, highways and tracks. The Commission shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe. The Commission shall have power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each such grade crossing."

Section 77, Illinois Public Utilities Act, Cahill's Ill. R. S. 1927, p. 1988, provides:

"Every person who, either individually, or acting as an officer, agent or employee of a public utility or of a corporation other than a public utility, violates or fails to comply with any provisions of this Act, or fails to observe, obey or comply with any order, decision, rule, regulation, direction or requirement, or any part or portion thereof, of the Commission, made or issued under authority of this Act, or who procures, aids or abets any public utility in its violation of this Act or in its failure to observe or comply with this Act or any such order, decision, rule, regulation, direction or requirement, or any part or portion thereof, in a case in which a penalty is not otherwise provided for in this Act, is guilty of a misdemeanor, and shall, upon conviction, be punished by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

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JURISDICTION[1]

The decree of the specially constituted District Court to be reviewed was entered April 24, 1926. (R. 162.) The direct appeal to this Court was allowed June 10, 1926. (R. 474.) The lower court denied a motion for temporary injunction (R. 145), and then dismissed the bill on the merits.

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[1] Under the heading "Jurisdiction of Plaintiff" (R. 1) the bill alleges the appellant is a corporation of Ohio and Indiana and "not of the State of Illinois." Under the heading "Jurisdiction of Defendants and Cause" (R. 2) the bill alleges:

"that all of said three corporations are citizens and residents of the State of Illinois, and there is a diversity of citizenship as between them and each of them, and your petitioner, * * * ; that this is a suit of a civil nature in equity between your petitioner and said three corporations as the substantial parties, * * * and the matter and sum in controversy * * * exceeds * * * the sum and amount of $4,000.00." (R. 2.)

By special appearance the Government challenged the jurisdiction based on the diversity of citizenship of corporations in a suit against the United States to set aside and enjoin an order of the Commission (R. 146) on the ground that such a suit may be maintained only under the Urgent Deficiencies Act (c. 32, 38 Stat. 219, 220; U. S. C. Title 28, Sec. 48). After hearing the special appearance was overruled and the Government answered. (R. 145, 147.) Thenceforth the Court treated the case as if it had been commenced under the Urgent Deficiencies Act.

The bill avers that defendant J. K. Dering Coal Company "has its principal place of business and business office located at 332 South Michigan Avenue in the City of Chicago." (R. 2.) Although not averred in the bill, it otherwise appears that the order was entered by the Commission on the petition of that defendant "an Illinois corporation, engaged in the mining of coal in Saline County, in southern Illinois"

The suit was brought to set aside an order of the Interstate Commerce Commission, and the jurisdiction of this Court on direct appeal rests on the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219, 220) and Section 238 of the Judicial Code as amended by the Act of February 13, 1925. (U. S. C. Title 28, Sec. 47.)

QUESTIONS

In the absence of a certificate of public convenience and necessity (R. 133) issued under Section 1 of the Interstate Commerce Act (c. 91, 41 Stat. 477), was the order of the Commission (R. 129) which required the Railway to construct, maintain, and operate at its own expense a *switch connection* between the siding of the coal company and the line of the Railway—

(1) authorized by paragraph (9) of Section 1 (c. 309, 36 Stat. 547; c. 91, 41 Stat. 475; U. S. C. Title 49, Sec. 1, paragraph (9) R. 87, 124), and

(2) based on substantial evidence; or

(3) prohibited by paragraphs (18) to (21) of Section 1 (c. 91, 41 Stat. 477, 478; U. S. C. Title 49, Sec. 1, paragraphs (18) to (21) (R. 133)?

(R. 116), and "a corporation duly organized and existing under the laws of the State of Illinois for the purpose, among other things of conducting the business of producing and selling bituminous coal, with principal office located at 1914 McCormick Building, Chicago, Illinois" (R. 84). There does not appear to be either averment or finding that J. K. Dering Coal Company has its "residence" in Northern District of Illinois, a requirement of Urgent Deficiencies Act.

STATUTES

The Act approved June 29, 1906 (c. 3591, 34 Stat. 584), amended the Act entitled, "An Act to regulate commerce," approved February 4, 1887, as amended (c. 104, 24 Stat. 379) by adding to Section 1 of the latter, *inter alia*, the following paragraph, viz:

> Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor and the Commission

may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

The Commerce Court Act (c. 309, 36 Stat. 547; U. S. C. Title 49, Section 1, paragraph (9)) re-enacted the foregoing paragraph with the slight italicized modifications, viz:

> Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper *or owner of such lateral, branch line of railroad,* such shipper *or owner of such lateral, branch line of rail-*

> *road* may make complaint to the commission, as provided in section thirteen of this Act, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the commission, other than orders for the payment of money.

The Transportation Act of 1920 made no change in the paragraph beyond inserting "(9)" at the beginning (c. 91, 41 Stat. 475, 476).

STATEMENT

In 1917 J. K. Dering Coal Company acquired 3,700 acres of bituminous coal land near Eldorado, Saline County, Illinois, which is estimated to contain 28 to 30 million tons yet unmined. (96 I. C. C. 143; R. 117.)

In the center of the tract is located the hoisting shaft and mine tipple, which is 2.5 miles northwest of the right of way of the C., C., C. & St. L. and immediately north of the right of way of the Illinois Central, which extends east and west from East St. Louis to Eldorado where it connects with the C., C., C. & St. L., which runs in a northeasterly and southwesterly direction. (96 I. C. C. 144; R. 117.)

Dering Company's most modernly equipped mine has a potential capacity of 4,000 tons per day and should easily and regularly produce 3,500 tons per day. The maximum produced is 2,700 to 2,800 tons per day, or between 50 and 60 cars. The mine has not reached its full development and Dering Company claims the potential capacity could be produced by increasing the labor supply and without enlarging the mine capacity or facilities. (96 I. C. C. 144; R. 117.)

The Illinois Central was the only outlet. The mine is located on a branch about 50 miles from the assembling yard and by reason of curves, grades and other conditions the Illinois Central was unable to handle in excess of 25 loads per train from the mine to the assembling yard. Dering Company advanced as reasons for the failure of the mine to develop properly that the Illinois Central was unable to furnish sufficient car service. (96 I. C. C. 144; R. 117.)

Prior to the acquisition of the coal lands Dering Company entered into negotiations with the C., C., C. & St. L. and Illinois Central relative to securing service from both. Reciprocal switching arrangements by the carriers were proposed but when the production on which it was based was reached in 1919, C., C., C. & St. L., instead of proceeding with the proposed reciprocal switching arrangement, suggested the building of a private track from the mine to a point on the line of the C., C., C. & St. L. west of Eldorado. (96 I. C. C. 144, 145; R. 118.)

C., C., C. & St. L., through its engineering corps, made the survey and, working in connection with Dering Company's mine engineer, they laid out a tentative switch track the location of which does not differ materially with the one which has been constructed. Because the corporation was not making any expenditures during Federal control, C., C., C. & St. L. refused to proceed further in accordance with the suggestion or to arrange for the consummation of the reciprocal switching arrangement.

On November 1, 1921, following the decision in which the Commission declined to give a joint status to Dering's mines (*Dering Mines Co.* v. *Director General*, 62 I. C. C. 265), C., C., C. & St. L., through its traffic manager, wrote to Dering Company:

> If your company cares to construct and maintain at your own expense a track from your mine up to our line, we will be glad to effect connection with such track, the point of connection of course to be designated by our operating department. (96 I. C. C. 145; R. 118.)

After further correspondence on the same subject, Dering Company acquired the right of way in fee at a purchase cost of $33,000. In order to reach the line of C., C., C. & St. L. over the acquired property it was necessary to cross several highways and the rights of way of the Illinois Central, and an electric line (96 I. C. C. 145; R. 119) operating between Eldorado and Carrier Mills paralleling the line of C., C., C. & St. L. on the north. Under a con-

tract dated December 20, 1922, between Dering Company and Illinois Central, the latter agreed, upon payment to it by Dering Company of $60,000, "to lay and construct said track and furnish all material needed therefor" (109 I. C. C. 59; R. 137, 138), and "the employes of the Railroad Company while engaged in the construction and maintenance of said track, and supervision of such work, shall, while so engaged, be considered the sole employes of the Coal Company" (109 I. C. C. 60; R. 138).

The contract provides the Illinois Central shall have the right to use the track and operate its engines and cars thereover for the purpose of serving the mine or mines of Wasson Coal Company located in the vicinity of the connection of that track with the tracks of the C., C., C. & St. L., including also mines of any other company, or for any other purpose not inconsistent with the use of the track by the Dering Company, or any other companies permitted by Dering Company to use the track. Illinois Central at its own expense was also permitted to construct spur tracks leading out of the track. (96 I. C. C. 151; 109 I. C. C. 61; R. 140.)

The contract with the electric line provides that for the privilege of crossing its right of way, Dering Company shall grant to the electric line the right to operate locomotives or electric engines, trains, and cars over the track for the purpose of transporting passengers and freight from and to all points of origin and destination on the mine lead track, or

transporting freight and passengers originating and destined from and to points on the connecting line, and the right to construct on and from said mine lead track and over and upon the right of way of said mine lead track a wye, or other suitable track connection between the mine lead track and the track of the electric line. (96 I. C. C. 150; R. 125, 412, 413.)

The construction of Dering Company's track was commenced in the latter part of 1923 and finished in early part of 1924; it connects with the lead track of Dering Company about 200 feet north of the crossing of Illinois Central and extends in a southerly direction 2.5 miles toward the C., C., C. & St. L. line and ends at approximately the line of the right of way. The track consists of 85-pound re-lay rails on creosoted ties which rest on 12 to 18 inches of cinders, gravel, etc., and in good line and surface. The crossing with the electric line and Illinois Central are of 90-pound rail. (96 I. C. C. 146; R. 120.) C., C., C. & St. L. officials had no information at the time of the conferences that an attempt would be made to have the Illinois Central operate over this track and the right to extend spurs from it. (96 I. C. C. 146; R. 120.)

Dering Company made repeated written requests upon C., C., C. & St. L. for the switch connection, one of which was made after the track had been constructed. The cost of the switch connection is estimated at $2,000 and Dering Company contends

that the traffic which will be handled over the connection will be sufficient to justify the installation and maintenance. (96 I. C. C. 147; R. 121.)

In a period of full car supply Dering Company shipped a great percentage of its coal to Chicago and territory beyond, while four competitors with mines on the C., C., C. & St. L. line in Saline County shipped only 21.7 per cent of their tonnage to the same territory. With an outlet over C., C., C. & St. L., Dering Company contends it would have been able to ship more coal because of additional markets and that it was precluded from markets in Michigan and Indiana because coal dealers prefer a one-line haul. (R. 121.)

The complaint prayed for an order under Section 1 directing C., C., C. & St. L. to construct, maintain, operate, or install a switch connection (R. 87). After answer and hearing the first report and order was filed by Division 5. (R. 129.) On further argument on petition of C., C., C. & St. L. the whole Commission concurred in the second report beginning with the statement "The material facts are stated in the report of division 5, 96 I. C. C. 143, and are not in controversy." (109 I. C. C. 55; R. 130.) The second order, which merely postponed the effective date of the first order from February 7, 1925 to May 4, 1926, was then entered. (R. 134.)

SUMMARY OF ARGUMENT

The provisions of paragraphs 18 to 21 are negative against the carrier only, whereas the provisions

of paragraph 9 are positive; in the former the carrier only and in the latter the shipper may make application to the Commission and procure the order for the objects which the respective statutes permit.

The purposes which the two statutes were designed to subserve differ proportionately as the methods differ by which they may be enforced.

On the undisputed facts the Commission has found that the Dering Company has fulfilled all of the requirements imposed by paragraph 9.

The argument that the case is controlled by the laws of the State of Illinois and not by the Interstate Commerce Act is contrary to the law established by a long line of decisions.

The fact that the appellant also owns and is engaged in the development of coal lands and properties and desires to protect its own private enterprise does not create a basis for refusal and failure to complete the switch connection.

ARGUMENT

The foundations underlying the extended arguments of the learned counsel for the appellant would seem to be that Dering Company's track is either a "sidetrack" within the meaning of paragraph (22) or a "connecting railway" and "an extension of railways" within the meaning of paragraphs (18) to (21) of Section 1 (Appendix A) (Br. 57); "the track is not a private sidetrack" (Br. 62); "appellant is not so situated that it can claim the benefit

of paragraph (9) of Section 1" (Br. 78); "appellee is not a shipper on the railway of appellant tendering interstate traffic to appellant for transportation within the meaning of paragraph 9" (Br. 11).

In order to maintain their position counsel are driven to the extreme of arguing that paragraph (9) was "modified" by paragraphs (18) to (22) of Section 402 (Br. 61); moreover, that the statutes of Illinois relating to railways and the opinions of the State courts concerning the same must, in effect, also be read into the Interstate Commerce Act to the end that the State statutes and decisions which tend to support counsel's theory may prevail that the Dering Company's switch track "is not a private sidetrack but a public interstate railway" which no carrier had the right to build "without a certificate of public convenience and necessity" (Br. 84).

Learned counsel misconceive entirely the purposes which paragraphs (18) to (21) were designed to subserve. The most cursory examination of those paragraphs will disclose that they are laid against the action of the carriers; thus, "no *carrier* * * * shall undertake the extension * * * or the construction," and so forth; and "no *carrier* * * * shall abandon," and so forth. In all instances the prohibitions are against the carrier. The purposes of these prohibitions are well known and may not be mistaken.

Congressman Esch (Wisconsin), on November 11, 1919, in reporting the railroad bill to "the Com-

mittee of the Whole House on the state of the Union" for the consideration of bill H. R. 10453, said:

> In section 402 we treat of extensions and abandonments. We believe one main cause of the so-called "weak sister" has been the unrestricted right of railroads to be built wherever their projectors thought fit. As a result of this unrestricted right we find in all States of the Union cases where, after a road has been built and long maintained and has gotten its traffic well established, another road puts in a parallel line with the usual result that instead of having one strong road doing the traffic we have two weak roads, as they have to charge the same rate between competitive points, and we burden the public by compelling it to sustain two weak roads when one strong road would have been sufficient.
>
> How does this bill stop that? In this way: Before a road or an extension thereof can be built it must get what is called in this bill a certificate of convenience or necessity from the commission as a condition precedent to the building of a single rod of the extension or of the new line. That means that the commission must first investigate the situation. It must first consult the communities that would be connected or would be located on the proposed line. It must consult the shipping interests and producing interests and all other interests that might be involved and then determine whether or not it should

issue a certificate of convenience and necessity.

This is not new law. Several of the States have this same kind of law now, notably the State of New York and the State of Wisconsin and other States, and the law has worked successfully. It has prevented the construction of new lines that could not by any possibility have any hope of meeting operating expenses, not to say anything about profits. It would prevent the construction of some of these short lines which may have no hope of ultimate financial success. In every way we have felt that this provision would lessen the number of "weak sisters," would prevent the creation of any new ones, and would strengthen the existing lines. We can get better service by strengthening the existing line than by creating a rival or parallel line which would diminish the ability of the first line to make further improvements and betterments. We have also provided for abandonments.

Railroads sometimes desire to surrender the rights granted by their charter. The traffic is not what they expected, business conditions change, the natural resources they thought first to get out to the open market become depleted or become exhausted. There is no power now to restrain abandonment under Federal law. Railroads in many States can do as they will. We provide that there shall be some Federal control over the matter of abandonment, so that cities and

> villages that have been built up on these lines can be given due consideration by the regulatory body before the order for abandonment is issued. We give such control to the commission to investigate the situation and determine the facts. But neither provision, the building of new lines or the abandonment of old ones, affects spurs or switches or terminal tracks or interurban lines wholly within a State. These we leave to State control, where they already belong. (Cong. Rec., vol. 58, pt. 8, pp. 8309, 8316.)

In *Texas & Pacific* v. *Gulf, Colorado & Santa Fe*, 270 U. S. 266, 272, 277, 278, this Court, after observing that "paragraphs 19 and 20 provide that a *carrier* desiring to construct one (an extension) may apply for the certificate," said:

> A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall

upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See *Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *The New England Divisions Case*, 261 U. S. 184; *The Chicago Junction Case*, 264 U. S. 258; *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331. The Act sought, among other things, to avert such losses.

When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, "spur, industrial, team, switching or side tracks . . . to be located wholly within one State." Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover, the expenditure involved is ordinarily small. But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where

it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern.

See also *Railroad Commission* v. *Southern Pacific*, 264 U. S. 331, 344, 345.

Coming now to paragraph 9, the whole situation is exactly the reverse. There the shipper or a lateral branch line may set the machinery of the Commission in motion; thus, "any common carrier * * * upon application * * * of any *shipper* tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such * * * private sidetrack which may be constructed to connect with its railroad * * *."

Paragraphs 19 to 21 are negative, whereas paragraph 9 is positive.

The amendment of 1910 also allowed any lateral branch line to file a complaint. Prior to that time only the shipper might file the complaint. "It is plain from the provisions of the act, the history of the amendments and justice, that the object was not to give a roving commission to every road that might see fit to make a descent upon a main line, but primarily, at least, to provide for shippers seeking an outlet either by a private road or a branch." (*Interstate Commerce Commission* v. *Delaware, Lackawanna & Western*, 216 U. S. 531, 537.)

"The most obvious examples of such lines (lateral branch) are those that are dependent upon and in-

cident to the main line—feeders, such as may be built from mines or forests to bring coal, ore or lumber to the main line for shipment." (*United States* v. *Baltimore & Ohio*, 226 U. S. 14, 19.)

Opposing counsel refer to "a practically admitted state of facts." (Br. 3.) In two reports after two hearings the Commission has found that Dering Company has fulfilled the terms and conditions of the statute; thus, "We find that complainant's siding has been constructed, that application in writing has been made by complainant for a switch connection therewith, and that interstate traffic has been tendered by complainant within the meaning of section 1 of the act; that there will be sufficient business to justify the construction and maintenance of the proposed connection; that the proposed connection is reasonably practicable and can be put in with safety and that it should be constructed and maintained by defendant." (R. 128; 96 I. C. C. 153.)

Counsel may not successfully maintain the Illinois Central and the electric line were without legal authority to grant permission to Dering Company to build its switch track across their tracks. *A fortiori*, as a consideration, why may not those companies impose reasonable conditions to their advantage without liability to themselves and without laying themselves open to the charge of undertaking the extension of their lines or the construction of new lines such as are contemplated by paragraphs 18 to 21? Illinois Central and the elec-

tric line presumably acquired some useful right for what they gave up and that was all that happened.

The argument that the case is controlled by the statutes and decisions of the State of Illinois (*C., C., C. & St. L. Railway* v. *Commission*, 315 Ill. 461) might well be dismissed with a repetition of the statement of the full Commission. "We, of course, are not concerned with the character of the track with respect to intrastate commerce." (109 I. C. C. 57; R. 133.) But the learned counsel for the appellant have devoted a large part of their brief of 171 printed pages to that subject.

Dering Company has shipped one-fourth of its output to destinations other than in Illinois and claims that with the switch connection it would be very natural for it to divide the tonnage approximately equally between the two railroads. (96 I. C. C. 147; R. 121, 122.) Southern Illinois mines, in which group Dering Company belongs, located on either Illinois Central or C., C., C. & St. L. ship substantial quantities of coal to Iowa, Michigan, and Indiana. (96 I. C. C. 148; R. 122.)

The fact that the switch track may also be used for the handling of intrastate traffic even in larger volume than the interstate traffic does not invalidate the order or stay the power of the Interstate Commerce Commission.

The power of Congress or its appropriate agencies without regard to any distinction between the dual character of interstate and intrastate traffic is established.

Switch connection. (*United States* v. *New York Central*, 272 U. S. 457.)

Recapture of Excess Earnings. (*Dayton-Goose Creek Railway* v. *United States*, 263 U. S. 456, 485.)

Stockyards. (*Stafford* v. *Wallace*, 258 U. S. 495, 522.)

Intrastate rates higher than interstate rates between same points. (*Railroad Commission* v. *Chicago, Burlington & Quincy*, 257 U. S. 563, 585; *State of New York* v. *United States*, 257 U. S. 591; *United States* v. *Village of Hubbard*, 266 U. S. 474.)

Bills of lading. (*United States* v. *Alaska Steamship Co.*, 253 U. S. 113; *United States* v. *Ferger*, 250 U. S. 199.)

Car doors. (*Loomis* v. *Lehigh Valley*, 240 U. S. 43.)

Headlights. (*Atlantic Coast Line* v. *Georgia*, 234 U. S. 280.)

Full crews. (*Chicago Rock Island & Pacific* v. *Arkansas*, 219 U. S. 453; *St. Louis, Iron Mountain & Southern* v. *Arkansas*, 240 U. S. 518.)

Pre-cooling and pre-icing of refrigerator cars. (*Atchison, Topeka & Santa Fe* v. *United States*, 232 U. S. 199, 221.)

Books of account and records. (*Interstate Commerce Commission* v. *Goodrich Transit*, 224 U. S. 194.)

Employers' Liability. (*Second Employers' Liability Cases*, 223 U. S. 1.)

Live stock shall not be confined in cars for period exceeding 28 hours. (*United States* v. *Baltimore & Ohio*, 222 U. S. 8.)

Hours of service. (*Baltimore & Ohio* v. *Commission*, 221 U. S. 612.)

Running of separate trains instead of mixed freight and passenger trains. (*Missouri Pacific* v. *Kansas*, 216 U. S. 262, 269.)

Coal cars, distribution of. (*Interstate Commerce Commission* v. *Illinois Central*, 215 U. S. 452; *Same* v. *Chicago & Alton*, 215 U. S. 479.)

Automatic couplers, safety appliances. (*Johnson* v. *Southern Pacific*, 196 U. S. 1.)

Color blindness, employees. (*Nashville, Chattanooga & St. Louis* v. *Alabama*, 128 U. S. 96.)

Automatic train control. (*Delaware & Hudson* v. *United States*, 5 F. (2d) 831.)

Tickets. (*Commutation Rate Case*, 27 I. C. C. 549.)

Ash pans on locomotives. (Ash Pan Act, c. 225, 35 Stat. 476; U. S. C. Title 45, Sec. 17.)

Locomotive boilers. (Boiler Inspection Act, c. 103, 36 Stat. 913; U. S. C. Title 45, Sec. 23.)

Block signals. (Joint resolution, 34 Stat. 838; U. S. C. Title 45, Sec. 35; Urgent Deficiencies Act, Oct. 22, 1913, c. 32, 38 Stat. 212.)

Learned counsel say that the specially-constituted District Court "manifested an antipathy to the position taken by counsel for appellant that this track was unlawfully built and is shown by the evidence

to have been constructed for the purpose of invading the transportation territory of appellant." (Br. 119.) On motion for stay pending appeal "Counsel for appellant mentioned the *invasion of its coal field* by other carriers and the interference with its ordinary operations on tracks congested with the traffic of industries located on its own railway * * *." (Br. 124.) Similar arguments continue (Br. 125, 142) until counsel conclude a statement in quotation marks of their own: "In other words, notwithstanding the State and Nation are associate sovereignties each supreme within its jurisdiction, and notwithstanding the jurisdiction of Illinois exclusively covers the construction and maintenance of this track, yet because we have authority to order a switch connection with a track which *may be built* we will assume that Congress by the words *'may be built'* means that if the track is physically built no matter how built or whether it can be maintained Congress authorized the coordinate sovereignty, the United States, to aid the malefactors who built this track in violating the law of the sovereignty, Illinois, which the Constitution requires us to protect when acting within the scope of its jurisdiction." (Br. 155.)

The height of the argument appears to be reached with the words, "We are aware that the Constitution and laws of the State of Illinois in face of Federal jurisdiction are mere waste paper, but the Fed-

eral statute and this Court have established beyond the possibility of doubt that the construction and maintenance of this track, if a private side track as found by the Commission, are within the exclusive jurisdiction of the State of Illinois." (Br. 157.)

All of this argument appears to be addressed to a certain situation which has appeared in this case and which may be explanatory of many of the acts on the part of C., C., C. & St. L., *e. g.*, the failure, after having promised in writing to do so, to complete the connection of the switch and by such means to refuse to accept new traffic for its line to the extent of approximately 25 cars per day. In other words after Dering Company has expended approximately $100,000, C. C. C. & St. L. will not fulfil its written promise which would cost it about $2,000 and by which it would acquire substantial increase in profitable traffic.

The Commission found (96 I. C. C. 146; R. 120):

> Defendant owns approximately 39,000 acres of coal land adjacent to its right of way in Saline County. Some of this land has been leased to the O'Gara Coal Company on a royalty basis. It opposes the installation of the connection, apparently for fear that the Central might some day operate over complainant's line and in connection with the power company reach these valuable coal properties.

The ownership and lease of these coal lands by C., C., C. & St. L., which transports the coal to the

markets, may not be set up as a basis for its failure and refusal to complete the switch connection. The use of the expression "the malefactors who built this track" would indicate there is competition and rivalry in the mining, selling and transportation of coal.

Any attempt of the C., C., C. & St. L. to remove itself from under the obligations of the Interstate Commerce Act because forsooth it, too, is engaged in the coal business should be repelled only in the way in which the learned Circuit Judge appears to have adopted, if it be true he "manifested an antipathy to the position taken by counsel for appellant."

The history of the case and the nature of the controversy are not unlike the very recent *New York State Barge Canal case*, in which the New York Central Railroad refused to comply with the terms of the statute and the order of the commission principally because of its own traffic which it desired to protect. (*United States* v. *New York Central*, 272 U. S. 457.)

CONCLUSION

The decree of the District Court dismissing the bill for want of equity should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

NOVEMBER, 1927.

APPENDIX A

Section 402 of the Transportation Act of 1920 provides (c. 91, 41 Stat. 476, 477; U. S. C. Title 49, Section 1, paragraphs (18) to (22)):

SEC. 402. The paragraphs added to section 1 of the Interstate Commerce Act by the Act entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' as amended, in respect of car service, and for other purposes," approved May 29, 1917, are hereby amended to read as follows:

* * * * *

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall

first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its

judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, or any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

"(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used

in this Act, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

"(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 95

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS Railway Company, appellant

v.

THE UNITED STATES OF AMERICA, INTERSTATE Commerce Commission, et al., appellees

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

STATEMENT

No opinion was rendered by the lower court in this case.

This is an appeal from a final decree of the District Court of the United States for the Northern District of Illinois, Eastern Division, dismissing a bill of complaint filed by the appellant in which the court was asked to set aside an order of the Commission, Division 5, dated February 7, 1925, as amended by the Commission's order of March 1, 1926. The decree is set forth on page 162 of the record, and the bodies of the orders referred to read, respectively, as follows:

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed a report containings [containing] its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, that the above-named defendant be, and it is hereby, notified and required to construct, on or before the 12th day of May, 1925, and maintain and operate thereafter, a switch connection between the siding of complainant, J. K. Dering Coal Company, and the line of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the location and description of which properties are more fully and at large set out in the report of the Commission; the expense of such connection to be borne by said defendant.

And it is further ordered, that this order shall continue in force until the further order of the Commission.

(Rec. 129.)

It appearing, that on February 7, 1925, division 5 entered its report and order in the above entitled proceeding; that by order of May 11, 1925, the commission reopened said proceeding for further argument; and that by order of May 27, 1925, the effective date of the said order of February 7, 1925, was postponed until the further order of the commission;

It further appearing, that further argument having been had and the case submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having on the date hereof, made and filed a report on further argument containing its findings of fact and conclusions thereon, which said report, and report and order of February 7, 1925, are hereby referred to and made a part hereof:

It is ordered, that the said order of February 7, 1925, be, and it is hereby, made effective on May 4, 1926.

It is further ordered, that this order shall continue in force until the further order of the commission.

(Rec. 134.)

The order of February 7, 1925, was made pursuant to a complaint filed in the Commission's office by the J. K. Dering Coal Company, and under authority conferred upon the Commission by paragraph (9) of section 1 of the Interstate Commerce Act. The language of said paragraph is as follows:

Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will

> furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

The order of February 7 is based upon findings of the Commission, Division 5, which are:

> We find that complainant's siding has been constructed, that application in writing has been made by complainant for a switch connection therewith, and that interstate traffic has been tendered by complainant within the meaning of Section 1 of the Act;

> that there will be sufficient business to justify the construction and maintenance of the proposed connection; that the proposed connection is reasonably practicable and can be put in with safety and that it should be constructed and maintained by defendant. * * *. (Rec. 128.)

These findings were affirmed by the Commission in its report of March 1, 1926, wherein the Commission said:

> Upon petition of defendant we reopened this case for further argument which has been had. The material facts are stated in the report of division 5, 96 I. C. C. 143, and are not in controversy. They will be restated only in so far as is necessary for a proper understanding of this report. Briefly, complainant, also referred to as the coal company, is the owner and operator of a coal mine served by a branch line of the Illinois Central. This mine is located about 2.5 miles from Eldorado, Ill., at which point the Illinois Central connects with the line of the defendant, likewise referred to herein as the Big Four. A track, some 3 to 3.5 miles in length, has been constructed by the Illinois Central for and at the expense of the complainant from the lead track connecting the mine with the Illinois Central to a point adjacent to the right of way of defendant about three miles southwest of Eldorado. By these proceedings, commenced January 23, 1924, complainant seeks to have us issue an order, as provided by section 1,

paragraph (9), of the interstate commerce act directing the defendant to construct and maintain a switch connection between it [its] rails and the track aforementioned. Complainant's track crosses the rails of the Illinois Central and three public highways and also the rails of the Southern Illinois Railway & Power Company, hereinafter referred to as the traction company, which line, some twenty miles in length, parallels the line of the defendant from Eldorado to Carrier Mills, Ill. Along this route a number of coal mines are located, now served by the defendant only. The point at which the switch connection is sought with defendant is not far from the mine of the Wasson Coal Company. A copy of the contract under which the Illinois Central constructed the track from complainant's mine to the right of way of the defendant is attached hereto marked Appendix A. A contract was also entered into between the traction company and the complainant, whereby the coal company was granted permission to cross the tracks of the traction company, and the latter was given the right to construct a wye between its tracks and the coal company's track and to operate freight and passenger engines and trains thereon, subject to certain prior rights granted to the Illinois Central.

In November, 1922, a joint petition by the Illinois Central, the traction company, and the coal company, was filed with the Illinois Commerce Commission wherein permission

was sought to construct and operate a track from the mine of the coal company across the tracks of the Illinois Central and the traction company to a point adjacent to the right of way of the Big Four.

On December 14, 1922, the State commission granted permission to the Illinois Central for the construction of the track across the railways and highways mentioned. A petition was then made by the complainant in this case to the State commission for an order requiring the defendant to make a switch connection with this proposed track. The Big Four was not made a party to the first petition and did not know the petition had been filed until after the entry of the order therein. After the filing of the petition for a switch connection with the proposed track the Big Four filed a motion to set aside the first order and sought leave to appear and defend against the petition. The first petition was thereupon reopened and consolidated with the petition seeking the switch connection, and they were heard together. At the close of the hearing the petitioners to the joint petition first filed moved to modify the order of December 14 to limit the use of the proposed track to that of a private mine track. On May 3, 1923, an order was entered by the State commission authorizing the construction of a mine lead track by the complainant, but limiting the use of such track to those ordinarily appurtenant to a lead track to a mine. On May 8, 1923, further orders were issued out of the

same proceeding requiring the installation of a switch connection with defendant's track, but limiting its use in accordance with the order of May 3, 1923. From these orders of the State Commission the Big Four appealed, contending that the track when constructed would become a public track, that the State commission had no power to limit the use of the track and that the proposed track was not a private or spur track, but a track connecting three railways and an extension of the lines of these railways which was a matter solely within the jurisdiction of this commission. It was further contended that the contracts between the coal company and the Illinois Central and the traction company constituted leases, and that the coal company had no authority under its charter to build, own, lease, or operate a railroad, and that no such authority could be conferred upon it by the State commission. The issues thus raised were finally adjudicated by the Supreme Court of Illinois in Cleveland, C., C. & St. L. Ry. Co. v. Commerce Commission, 311 Ill., 461, 146 N. E. 606, following which the petition for reargument was filed.

The court held, in effect, that the contracts under which the track under consideration was built and the uses to which that track was to be put constituted an extension of the rails of the Big Four, as well as those of the Illinois Central, and the traction company; in short, that under the contracts between the coal company and the Illinois Central,

and between the coal company and the traction company, the track could not be considered as a private side track or spur. The court also held that as the coal company was already served by a railroad, section 5 of the State constitution did not give it authority to compel a connection with another railroad upon which it is not located "where, as here, such connection would be, in effect, extending the line of the railroad affected"; further, that a coal corporation is not a public utility and "possesses no charter powers to build a railroad." The orders of the State commission were held to be void and set aside.

The Supreme Court of Illinois is charged with the duty of construing the laws of the State of Illinois. Under the laws of that State a private track becomes a public track if and when it crosses a public highway. However, the laws of Illinois and the decision of the Supreme Court of that State in no way affect the character and use of this track in so far as interstate commerce is concerned. We must assume that even though the contracts between complainant, the Illinois Central, and the traction company are sufficient to give to either of those carriers the right to handle traffic in interstate commerce over this track for the public generally, the fact remains that before either of those carriers could exercise such right it would be necessary to first obtain from us a certificate of public convenience and necessity, as provided in paragraph (18) of section 1 of the interstate commerce act. We have issued no

such certificate. It follows that as to interstate commerce no carrier has a right of operation over this track which would change its character from a private track to a public track. We, of course, are not concerned with the character of the track with respect to intrastate commerce.

We affirm the finding of division 5. An appropriate order will be entered.

(Rec. 130–133.)

Points relied upon by appellant in support of its contentions that the decree of the lower court should be reversed and that the Commission's order of February 7, 1925, as amended by its order of March 1, 1926, should be set aside will be found on pages 483 and 484 of the record. The most important of these points appears to us to be appellant's contention that the orders are not supported by evidence.

For convenience hereinafter the orders mentioned will be referred to as the order of February 7.

ARGUMENT

I

THE COMMISSION'S FINDINGS SUPPORT THE ORDER OF FEBRUARY 7, AND THE FINDINGS ARE AMPLY SUPPORTED BY EVIDENCE CONTAINED IN THE RECORD

As above shown, the Commission found: That application in writing for the switch connection covered by the order of February 7, addressed to appellant, was made by the Dering Coal Company; that the coal company tendered interstate traffic to appellant for transportation; that there will be

sufficient business to justify the construction and maintenance of the connection; and that the connection is reasonably practicable and can be put in with safety. A comparison of these findings with paragraph (9) of section 1 of the Interstate Commerce Act, above set forth, will show that they are in accordance with the requirements of that paragraph, and, if supported by evidence, they are full authority for the action taken by the Commission in making and issuing the order of February 7.

We understand the findings, that application in writing for the switch connection was made and that interstate traffic was tendered for transportation, to be admitted by appellant, and an examination of pages 190 and 195 of the record will show them to be fully supported by evidence.

Concerning the business to be furnished by the coal company to appellant and transported over the connecting track, the Vice President of the coal company, Mr. Pauley, said:

> Assuming we have a connection with the Big Four, with the switch track in question, as to the approximate amount of tonnage that would be delivered to the Big Four for transportation from this mine and over this connection, I can only say that if we were located jointly on the Illinois Central and the Big Four it would be very natural for us to divide the tonnage approximately equal between the two railroads. What part of it might go to intrastate and what part to interstate I could not say with any degree of

> accuracy. At the present time we are getting out more than 50 cars per day. If the mine were at its capacity we would be getting more than 70 cars a day. At the present time, as I say, the inclination would be to divide the business equally, if there were no governing factors. We would then give the Big Four 25 cars per day, which would be 1,250 tons. I can state that there would be a substantial amount of tonnage delivered to the Big Four for shipments via its line to interstate points daily after this connection is provided. Based upon my knowledge of the markets and general conditions, that amount of tonnage should not be less than 20 cars. It would move to interstate destinations, largely. I would say if we were going to take interstate and intrastate we would be giving them more than 20 cars per day. A portion of that would move to Chicago. The freight rate from Eldorado to Chicago via the Big Four is $1.95. (*Rec.* 204–205.)

And a question asked by counsel and the answer of the Assistant to the Vice President of the coal company, Mr. Fenton, are:

> **Q.** Have you made any computation as to what revenue the Big Four would probably get on coal that would be delivered over this connection based upon your knowledge; if we had the connection, the number of carloads of coal per day that would be delivered to the Big Four?
>
> **A.** In any joint mines where I have had any experience, the tonnage moved relatively

> half and half. But assuming that it would not, and assuming that the J. K. Dering Coal Company could ship 20 cars per day, that would be 1,000 tons per day, or 200,000 tons per annum. The revenue to the Big Four would be, assuming a Chicago freight rate, $1.95 per ton, which figures $390,000 per annum gross revenue from the business.
>
> (Rec. 271.)

Evidence that the switch connection covered by the order of February 7 is practicable and can be put in with safety is as follows:

Pertinent statements made by Mr. Pauley are:

> I am generally familiar with the construction of mine tracks or the nature of mine tracks that serve mines in Illinois and Indiana. I became familiar with them by walking over them; seeing them in operation. At one time I had charge of the management of the Ogara Coal Company—over a period of approximately 2 years—from about April, 1917. At that time they had 10 mines in Saline County. I say that the track in question here can be operated with reasonable practicability and safety in the handling of coal cars, loaded and empty, from the Dering Coal Company Mine No. 2 to the connection of the Big Four. I am not a track expert, but I have seen mine tracks for 6 or 7 years. I have not seen any better than this, and my instructions to the experts who were to build this track—when we were negotiating a contract for that purpose—were to build the best they knew how for the purpose for

> which it is intended. The layout compares very favorably with reference to other lay-outs in southern Illinois that I know of—with reference to operation. (Rec. 194.)

Pertinent testimony of Mr. Oren, an engineer located at Effingham, Illinois, is:

> * * * In my opinion, a connection can be made between this track and the track of the Big Four so that the trains can be operated over there safely and not materially increase the hazard of operation on the track of the Big Four. * * *. (Rec. 225.)

Mr. Hunter, an engineer located at Danville, Illinois, testified as follows:

> It is my opinion that cars and engines may be operated over this track with reasonable safety. Comparing this lay-out with many other similar lay-outs that I have had experience with, with crossing stop signs requiring trains to stop in accordance with the law, that is, within 80 [800] feet of the crossing, I consider that that method of operation on this track would be had with a reasonable degree of safety. I know of several similar crossings in both Illinois and Indiana. I have had to do with the construction of tracks where a similar type of construction was used. I made an examination of the end of this track where the proposed connection with the Big Four would be made, and also of the point in the Big Four track where that connection would be located, and it is my opinion that such a connection could be made without materially increasing the hazard of

operation over this Big Four track. (Rec. 233–234.)

Appellant's Division Superintendent, Mr. Milligan, stated that appellant has two tracks leading in a westerly direction from Eldorado to Harrisburg, and described the use made of the most northerly of these tracks, with which the coal company's track, by the Commissioner's order of February 7, is required to be connected. Mr. Milligan, among other things, said:

> * * * We have 4 mines between Harrisburg and Eldorado that are adjacent to this track; but we serve 4 other mines from this track. They are located at various points on the L. & N. Railroad and on the Illinois Central. * * *. (Rec. 240–241.)

Thereupon, Mr. Hunter was recalled and testified as follows:

> I have heard the testimony of Mr. Milligan just given. Taking all the facts given by him and the situation as described by him, it is my opinion that this track can be connected with safety. I will go further and say that, if all this movement about which I have heard in the testimony was over one track, in both directions, it could still be connected without unreasonable hazard. In my judgment, it would not materially increase the hazard of operation over this track of these trains that Mr. Milligan has mentioned. (Rec. 242.)

We think the foregoing establishes that the Commission's findings of fact support the order of February 7 and that the findings are in turn supported by the evidence upon which they are based. However, a contrary view is expressed by appellant, as we will show under the next heading.

II

PARAGRAPH (9) OF SECTION 1 OF THE INTERSTATE COMMERCE ACT WAS NOT MODIFIED BY THE TRANSPORTATION ACT

No. 1 of the points relied upon by appellant in support of its contention that the order of February 7 should be set aside reads as follows:

> Because Paragraph "G" (or 9) of Section 1, of the Interstate Commerce Act was modified by Paragraphs 18 to 22 of Section 402 of the Transportation Act and a new policy established by which side, spur and industrial tracks were completely excluded from the jurisdiction of the Interstate Commerce Commission and committeed [committed] to the jurisdiction of the several states, and if the track in controversy is a side-track within the meaning of said Paragraph "G" (or 9) the Interstate Commerce Commission had no jurisdiction to require its connection, maintenance or disconnection, and if not no jurisdiction was conferred by the petition or complaint filed herein. (Rec. 483.)

Paragraphs (18) to (22), inclusive, of Section 402 of the Transportation Act are the same as paragraphs (18) to (22), inclusive, of Section 1 of the

Interstate Commerce Act, but we are unable to discover any language in those paragraphs which appears to us to show a disposition on the part of Congress to modify the authority over switch connections which, prior to the passage of the Transportation Act, had been conferred upon the Commission by paragraph (9) of Section 1 of the Interstate Commerce Act hereinbefore quoted. We understand the language principally relied upon in this connection by appellant is contained in said paragraph (22), which reads:

> The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban or interurban electric railways, which are not operated as part or parts of a general steam railroad system of transportation.

An examination of paragraphs (18) to (21) will show that they confer upon the Commission authority in addition to that which had previously been conferred by paragraph (9), and, since the restriction contained in paragraph (22) relates only to authority conferred by paragraphs (18) to (21), we think it is apparent that appellant's contention concerning a modification of paragraph (9) has no foundation upon which to rest.

III

PROCEEDINGS BEFORE THE ILLINOIS COMMERCE COMMISSION AND BEFORE CERTAIN COURTS OF THAT STATE DO NOT EVEN TEND TO ESTABLISH THAT THE ORDER OF FEBRUARY 7 IS INVALID

Point IV of the points relied upon by appellant is as follows:

> The record shows that the J. K. Dering Coal Company first elected to proceed under a similar statute of the State of Illinois to obtain a connection between the track here involved and the railway of Appellant and relied upon substantially the same facts as are here involved. And adjudication of the issues in that case, therefore, is conclusive of the issues of material fact adjudicated as between the Appellant and the Dering Coal Company in this proceeding as to the status, relations of the parties and the application of the laws of Illinois thereto, and the J. K. Dering Coal Company was in law estopped to proceed upon the same matter before the Interstate Commerce Commission and, therefore, its petition should have been dismissed. (Rec. 484.)

The proceedings referred to in the above quotation are described in *Cleveland, C., C. & St. L. Ry. Co. v. Commerce Commission*, 146 N. E. Rep. 606, from which we quote as follows:

> Appellant seeks review of a judgment of the circuit court of Saline county, affirming two certain orders of the Illinois Commerce Commission, one of which granted permis

sion to the appellee, the J. K. Dering Coal Company, to construct and maintain at grade across the tracks of the Illinois Central Railroad Company, and across the tracks of the Southern Illinois Railway & Power Company, and across three highways in Saline county, a railroad track. The proposed track was to extend south from the coal mine of the coal company a distance of over 3½ miles, and across the two railroads and the three highways mentioned, to the right of way of the appellant, hereinafter called the Big Four. The second order appealed from required the appellant to construct, maintain, and operate on its own right of way a switch track, connecting the track authorized by the first order with the main track of appellant. * * * (Id. 608.)

* * * * *

* * * It * * * appeared on the hearing that the coal company had entered into a contract with the Illinois Central to build the proposed track at the expense of the coal company. By this contract the coal company gave to the Illinois Central the right to operate over the track with its trains and cars, the right to extend other tracks from it to other mines and properties, to change the grade of the track, to maintain additional crossings, to have the right of way in operation of its trains over the crossings, and to connect this track with its main line track. * * * The coal company also entered into a contract with the Traction company providing for a crossing over its rail-

way and a wye connection with it, and for the operation of the track jointly with the Illinois Central for passenger and freight service, conferring on the Traction company privileges similar to those granted to the Illinois Central, but subject thereto. (Id. 609.)

* * * * *

The first question involved in the case is whether or not this track, when constructed, would be a spur track, or, in fact, a railroad extension. If the former, jurisdiction lies in the Illinois Commerce Commission to enter the orders entered herein, provided the evidence shows a proper case; if the latter, the Commission has no jurisdiction, as jurisdiction over such matters is vested in the Interstate Commerce Commission by the federal Transportation Act. * * * (Id. 610.)

* * * * *

* * * These contracts, and the fact that this track constitutes an actual physical connection of three railroads, and is completely adapted to the extension of their lines, make it clear that if built it could not be said to be a private spur track merely for railway service to the coal company's mine. (Id. 611.)

* * * * *

* * * it is well settled in this state that a railway track built and connected as here proposed becomes thereby a part of the public railway highways of the state, free and open to the use of the public. * * *. (Id. 612.)

* * * * *

Appellees * * * urge that under section 45 of the Public Utilities Act they are entitled to this connection with appellant. That section provides as follows:

"Every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or receiver of freight, or of any corporation, person or municipal corporation owning, operating or controlling any wharf or harbor facilities, for a connection between the railroad of such railroad company and any existing or contemplated track, tracks or railroad of such corporation, person or municipal corporation, shall make such connection and provide such switches and tracks as may be necessary for that purpose and deliver and receive cars thereover: Provided, that such connection is reasonably practicable and can be installed and used without materially increasing the hazard of the operation of the railroad with which such connection is sought, and that the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company."

(Id. 612.)

* * * * * * *

* * * The Illinois Commerce Commission has no powers except these [those] granted it by the Public Utilities Act. That act gives it no power to authorize private corporations to build railroads. Nor does it avail anything to say that under the contract

> between the parties the Illinois Central is to build the track. The evidence shows that the coal company is to pay for and own it. The railroad company is the agent of the coal company in the building of the track. (Id. 613.)
>
> * * * * *
>
> The orders of the Commerce Commission were void, and the circuit court erred in affirming them. The judgment of that court is therefore reversed, and the orders of the commission set aside. (Id. 613.)

It thus appears that the order of the Illinois Commerce Commission which authorized the Dering Coal Company to construct the track under consideration in this case, and the order of the Commission which required appellant to construct and maintain a switch connection between that track and appellant's track, were set aside by the Supreme Court of the State of Illinois because the court concluded that in making and issuing the orders the Illinois Commerce Commission exceeded the authority conferred upon it by the Public Utilities Act of that state; and it further appears that the findings of fact which the Illinois Commerce Commission must make before it can issue such a switch-connection order are entirely in harmony with the findings of fact upon which is based the Interstate Commerce Commission's said order of February 7. That such findings were made by the Illinois Commerce Commission in connection with its order authorizing the construction of the Dering

Coal Company mine lead track is shown by Exhibit No. XII, from which we quote as follows:

> The Commission having given due consideration to the petition in this case, and having caused the said proposed railroad crossings at grade to be viewed as required by law, and after full investigation and with due regard to the safety of life and property, is of the opinion and finds that the construction of the said mine lead track is necessary in order to facilitate the movement and distribution of coal cars to and from Dering Mine No. 2 and to increase the output thereof; that the installation of the said crossings will not unnecessarily impede or endanger traffic or transportation upon the railroad to be crossed; * * *. (Rec. 327.)

It is true that the Supreme Court of Illinois held that under the laws of that State the Dering Coal Company track, if constructed, would be a public railway highway, but we are unable to see how, consistently, it can be contended that this holding is a binding conclusion, or any conclusion at all, concerning the authority conferred upon the Interstate Commerce Commission by paragraph (9) of section 1 of the Interstate Commerce Act, which, as hereinbefore stated, is the paragraph under which the Commission operated in making and issuing the order of February 7.

As above shown, pertinent language contained in the Interstate Commerce Commission's report of March 1, 1926, is as follows:

> * * * We must assume that even though the contracts between complainant, the Illinois Central and the traction company are sufficient to give to either of those carriers the right to handle traffic in interstate commerce over this track for the public generally, the fact remains that before either of those carriers could exercise such right it would be necessary to first obtain from us a certificate of public convenience and necessity, as provided in paragraph (18) of section 1 of the interstate commerce act. We have issued no such certificate. It follows that as to interstate commerce no carrier has a right of operation over this track which would change its character from a private track to a public track * * *. (Rec. 133.)

IV

ACTION TO BE TAKEN BY THE COMMISSION UNDER PARAGRAPH (9) OF SECTION 1 OF THE INTERSTATE COMMERCE ACT DOES NOT DEPEND UPON THE LAW OF THE STATE OF ILLINOIS AS CONSTRUED BY THE SUPREME COURT OF THAT STATE OR UPON FINDINGS OF FACT MADE BY THAT COURT

It will be seen that paragraph (9) of section 1 of the Interstate Commerce Act contains no language which indicates on the part of Congress an intention to allow the application of that paragraph to be controlled by the law of the State of Illinois or of any other state, and evidence included in the record under consideration here shows clearly that such control would be improper.

Matters advanced by appellant in support of its contention that the order of February 7 is invalid, in addition to those we have already discussed, are included in Nos. II and III of points relied upon by appellant, and are as follows:

> (a) The Complainant was not a shipper on Defendant's railway.
>
> (e) The track in controversy was built contrary to law and in contemplation of law is no track.
>
> The findings of the Commission are predicated upon immaterial facts, and the Commission omitted to make findings upon material issues presented by the pleadings and evidence.
>
> (Rec. 483–484.)

It is, of course, true that the mine of the Dering Coal Company was not connected with the line of railway of appellant until the switch connection required by the order of February 7 was made, but the record shows that the coal company, in purchasing its coal lands and in locating its mine, and in making other investments, acted in accordance with and relied upon what it understood to be a promise that the mine would be served by both the appellant and the Illinois Central, and also shows that service of the mine by the appellant is necessary to facilitate the shipment and transportation of coal in interstate commerce. In this connection we quote from the record as follows:

> About or prior to the time of the acquisition of the property and the location of the

mining shaft, we had negotiations with the defendant and Illinois Central with reference to the transportation service and transportation facilities for serving this mining property. (Rec. 184.)

* * * Had we not believed we had the consent of both railroads to give us service the shaft could have been located south of the Illinois Central where it would not have been necessary to cross the Illinois Central in order to reach the Big Four. * * *. (Rec. 185.)

The complainant would not have invested money in the mining property here under consideration had it not been assured by the defendant it would have service and would be able to obtain service from that company in the mining and shipping of its coal. * * *. (Rec. 186.)

The approximate cost of this track, including the right of way, to the Dering Coal Company will exceed $100,000. (Rec. 195.)

* * * Should we not get a connection to the Big Four Railroad, we would find ourselves with this large mine on the branch line of the Illinois Central Railroad which we knew when we bought the property could not serve us satisfactorily, and which fact has since been demonstrated. * * *. (Rec. 196.)

* * * If we had a direct connection with the Big Four the movement of traffic to a great many stations in Indiana and Michigan would be a one-line haul. The

market of this particular mine today is up through Illinois to Chicago and points beyond. It has not developed any market to any great extent in Indiana and Michigan because of the railroad facilities. (Rec. 202–203.)

As to whether or not I have any opinion as to the fact that we do not have a direct connection having anything to do with our inability to market coal in Indiana and Michigan: That reason has been given me by salesmen. * * *. (Rec. 203.)

* * * We want the service of the Big Four Railroad, as demonstrated by the fact that we are paying $100,000 to get it, which is a lot of money for a coal company and we are not kidding ourselves or you. We would not spend $100,000 for something we did not need. I think we need it or we would not do it. * * *. (Rec. 219.)

* * * We didn't sink our mine between the Illinois Central and the Big Four because the lay of the land, the slope of the surface would lend itself better to the building of mine sidings, give us the natural grades we wanted in the location in which we placed the mine, and we had the agreement of two reputable railroads to give us joint service. Therefore we thought it made no difference. I refer to Mr. Worcester's agreement to make a reciprocal arrangement with the Illinois Central which would give us the service of both roads. * * *. (Rec. 220.)

> • • • Mr. Worcester is Vice President and General Manager of the Big Four. • • •. (Rec. 211.)
>
> • • • This mine has a very poor, let us say, production history. It is 7 years old and should have reached its full capacity long ago under normal conditions. The reason that it has not reached its normal capacity is by reason of the inadequate railroad service and lack of markets. • • •. (Rec. 257.)

To the same effect see record 197, 198, 200, 208, 258, 259, 260, 261, and 269.

The above excerpts are taken from the testimony of the Vice President of the Dering Coal Company, Mr. Pauley, and appears to us to be very much in conflict with a finding of fact contained in the aforesaid decision of the Supreme Court of Illinois, which finding is as follows:

> • • • It is not shown that the coal company is unable to reach any desirable market with the service given by the Illinois Central. • • •. (Id. 609.)

The Supreme Court of Illinois also found that:

> • • • No complaint to the Illinois Central arising out of lack of cars appears to have been made, or any proceedings had to secure more service from it. • • •. (Id. 609.)

Upon this point the testimony of Mr. Pauley, which we understand to be undisputed, is:

> • • • We have complained to the Illinois Central about our service at the mine;

> we have complained all the way from Carbondale, their division headquarters, to Chicago; going from their car distributor and train dispatcher all the way to Mr. Markham, the president of the road. * * *. (Rec. 221.)

That the track of the Dering Coal Company would not have been constructed if the coal company had not been assured by appellant's traffic manager, Mr. Stevenson, that the track if constructed would be connected with appellant's line of railway is indicated by questions and answers included in the record, which are as follows:

> Q. After my conference with you of September, 1922, wherein it was suggested that we desired a connection with your company for the purpose of serving this mine, as I understand it you took the matter up with Mr. Worcester and it was agreeable to make a physical connection with a track we might construct?
>
> A. Yes, but that did not contemplate serving the mine in furnishing cars.
>
> Q. Mr. Worcester did not change his or you did not change your views on that matter until you learned the Illinois Central might at some future time use this track to invade your territory, as you termed it. Is not that the fact?
>
> A. That is what made the objection to making the connection, yes, but I cannot conceive of what possible advantage or use there would be in having a connection if we were

not going to serve the miners to furnish the cars.

By Director Bartel:

Q. That was what I was wondering, Mr. Stevenson. In that letter you wrote to Mr. Cardy November, 1921, you said you had no objection to making a connection there.

A. Yes, sir.

Q. What good would the connection be unless you served the mine?

A. None whatever. That is why I said I was surprised to find out about 8 months afterwards that they were getting ready to build a track.

Q. You told them to build a track and you would make a connection. Didn't you know if you made a connection it would be necessary for you to serve that connection?

A. I knew, but I did not suppose telling him we would only make a connection that he would go ahead and build the track. In other words, that was tantamount to saying no without saying no.

(Rec. 317.)

Notwithstanding appellant's statement that the Dering Coal Company track "was built contrary to law and in contemplation of law is no track," the record made before an examiner of the Commission on February 15, 16, and 18, 1924, appears to show that the construction of the track was completed after the order of the Illinois Commerce Commission authorizing the construction had been affirmed by the Circuit Court of Saline County, Illi-

nois, and before the date of the stay order entered by that court. In this connection we quote from the record as follows:

> * * * The track from the mine to the right of way of the Big Four was actually completed and laid to move cars thereon within the last few days. (Rec. 191.)
>
> Mr. Cardy: I will make the statement for the record that on January 11, 1924, the Circuit Court of Saline County affirmed both orders of the Commission. In affirming the order of the Commission it issued a so-called suspension order the first day of the April Term of the Supreme Court of Illinois, * * *. (Rec. 213.)

We are in doubt concerning the meaning of appellant's statements, that the findings of the Commission are predicated upon immaterial facts and that the Commission omitted to make findings upon material issues presented by the pleadings and evidence, because, as above shown, the findings made by the Commission were the only findings necessary to enable it to exercise the authority conferred upon it by paragraph (9) of section 1 of the Interstate Commerce Act and make the order of February 7. However, if appellant's contention is that the Commission should have made findings and reported conclusions in accordance with the law of the State of Illinois as construed by the Supreme Court of that state, we think the contention is fully answered by what we have already said.

For the reasons above set forth we insist that the appeal in this case should be dismissed.

Respectfully submitted.

P. J. FARRELL,

E. M. REIDY,

For Interstate Commerce Commission,

Appellee.

○

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 95

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND J. K. DERING COAL COMPANY,

Appellees.

BRIEF FOR J. K. DERING COAL COMPANY.

JAMES M. SHEEAN,
CLARENCE B. CARDY,
Counsel for J. K. Dering Coal Company.

SUBJECT INDEX.

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THE SOLE ISSUE BETWEEN APPELLANT AND THIS APPELLEE, VIZ:

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scription of which properties are more fully and at large set out in the report of the Commission; the expense of such connection to be borne by said defendant." (Italics ours.)

Such order was pursuant to and predicated upon the report of the Commission and the findings therein contained (R. 116-129) reported as *Dering Coal Company* v. *C. C. C. & St. L. Ry. Co.* 96 I. C. C. 143-153, which report resulted from petition (R. 84-88) filed by the Coal Company on January 23, 1924 (R. 116), answer of the railroad (R. 88-115), hearings at which much testimony was heard and numerous exhibits introduced (R. 180-435), proposed report submitted by the Examiner (R. 438-448), exceptions thereto by the railroad (R. 448-450) and brief in support of such exceptions (R. 492). Upon the railroad's petition for reargument and for extension of the effective date of the order, the proceedings were reopened (R. 63), further oral argument was had before the full Commission, briefs were submitted and in a report (R. 130-133) concurred in by the full Commission, the prior report and order of Division 5 was affirmed on March 1, 1926, and the following order was thereupon entered (R. 134):

"It appearing, that on February 7, 1925, division 5 entered its report and order in the above entitled proceeding; that by order of May 11, 1925, the commission reopened said proceeding for further argument; and that by order of May 27, 1925, the effective date of the said order of February 7, 1925, was postponed until the further order of the commission;

It further appearing, that further argument having been had and the case submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having on the date hereof, made and filed a report on further argument containing its findings of fact and conclusions thereon, which said report, and report

and order of February 7, 1925, are hereby referred to and made a part hereof;

It is ordered, that the said order of February 7, 1925, be, and it is hereby, made effective on May 4, 1926. It is further ordered, that this order shall continue in force until the further order of the commission."

THE ISSUE BETWEEN THE SHIPPER AND THE CARRIER.

The case, as between the shipper and the carrier, involves a single question, viz:

> Is there power, State or National, to compel the railroad, in its capacity as common carrier, to expend $2,000 and thus provide for Dering's 3,600 acres of coal land the same or similar transportation facilities which the carrier provides (R. 206) for the 39,000 acres of competitive coal lands owned by the railroad? (R. 305-306).

The Coal Company contends:

1. There is such power properly exercised herein by the order of the Interstate Commerce Commission (R. 116-129; 130-134)—such power being specifically given by paragraph 7 of Section 1 of the Interstate Commerce Act as amended by the Hepburn Act and the Mann-Elkins Act (24 Stat. 379, 34 Stat. 584, 36 Stat. 544), which by the amendment of February 28, 1920, c. 91, Sec. 402, became paragraph 9 of Section 1 of Title IV of the Transportation Act 1920 (41 Stat. 474-478) which is now paragraph 9 of Section 1 of Title 49 of the United States Code (44 Stat. 1652) as follows:

> "*Any common carrier* subject to the provisions of this chapter, *upon application of* any lateral, branch line of railroad, or of *any shipper* tendering interstate traffic for transportation, *shall construct*, maintain, and operate upon reasonable terms *a switch connection* with any such lateral, branch line of railroad, or private sidetrack which may be constructed to connect with its railroad, where such con-

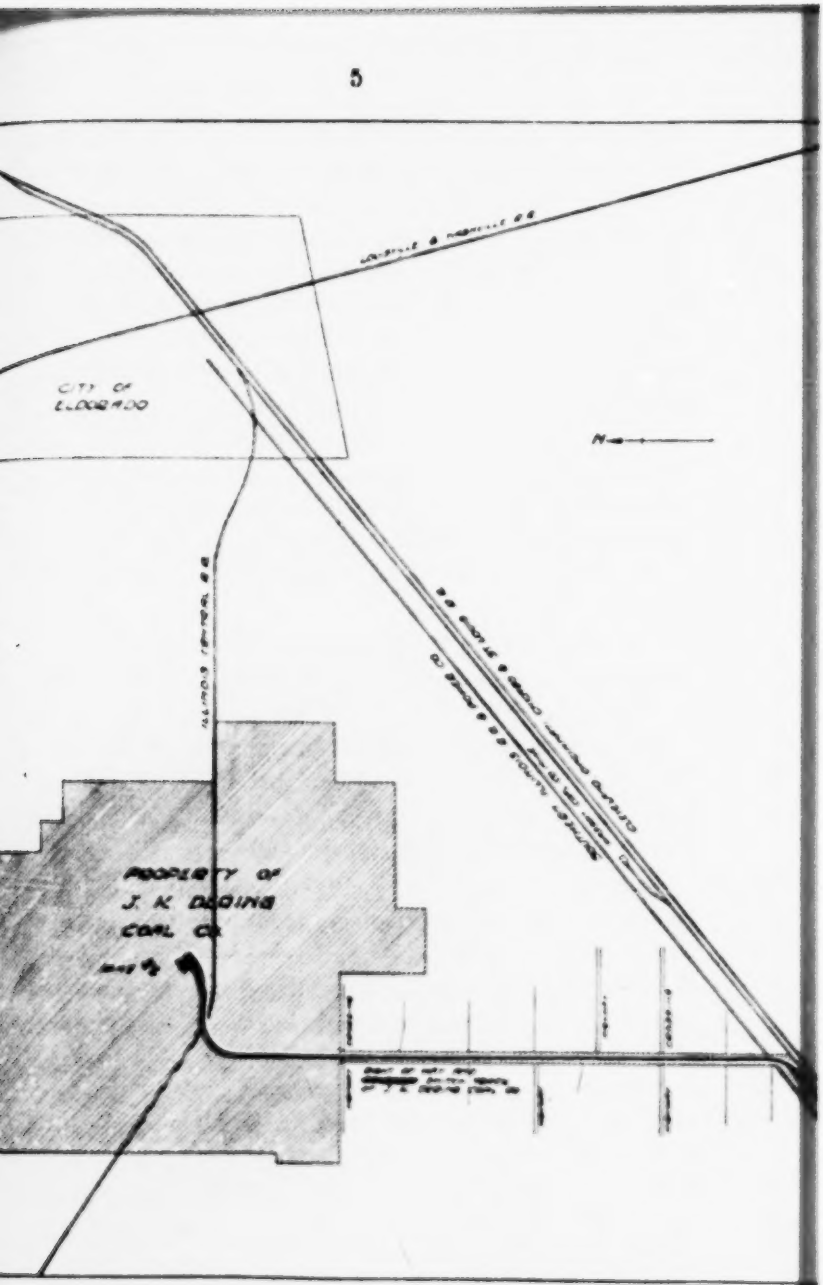
nection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper." (Italics ours.)

2. The sustaining of appellant's contentions herein would enable the railroad to accomplish the unthinkable result of having successfully resisted an order of the Illinois Commerce Commission on the ground that the Interstate Commerce Commission had sole and exclusive jurisdiction of the question whether this connection should or should not be made, and also successfully resisting the order of the Interstate Commerce Commission on the ground that this identical subject matter was *dehors* the jurisdiction of the Federal Commission.

The Facts.

In 1917 the Coal Company acquired 3,670 acres of coal land in Saline County, Illinois, containing over 20,000,000 tons of bituminous coal, the southeast boundary of which tract is about ½ mile northwest of the right of way of the Big Four. The hoisting shaft and mine tipple were located in about the center of this acreage or some 2½ miles northwest of the appellant's right of way and immediately north of the right of way of the Illinois Central Railroad.

Sketch printed on the next page shows the *locus in quo*. On this sketch the Dering property is indicated by cross-hatching and consists of a generally rectangular tract, plus a 60-foot strip running to the right of way of the Big Four. This 60-foot strip is owned in fee by the Coal Company. (R. 209.)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Prior to the acquisition of the property and the location of the mining shaft thereon, representatives of the Coal Company had negotiations with representatives of appellant with reference to transportation facilities for serving this mining property in which the Coal Company eventually made an investment of approximately $1,700,000. (R. 183.) Such an investment would not have been made without having assurance of the joint service of two railroads, and such assurance was given by the appellant orally and in writing. (R. 185-186.) The commercial necessity of obtaining direct track connection with the Big Four to enable this mine to reach markets in Indiana and Michigan by a one-line haul is developed in the testimony before the Commission. (R. 202, 203, 236.)

The underground development, the shafts and all the equipment were constructed and installed to give the mine a potential capacity of 4,000 tons per day which has been developed up to 3,500 tons per day (R. 183), but this potential capacity has been restricted to an actual output of about 2,000 tons per day through inadequate transportation facilities. (R. 196, 197.)

Under date of October 8, 1917 (Exhibit 1, R. 12) the vice president and general manager of the railroad agreed that when the mine had reached a certain point of production arrangements for Big Four service would be effected. The mine having reached, in the summer of 1919, the approximate tonnage referred to in the communication of the vice president and general manager of the railroad, the carrier was pressed by officials of the shipper to consummate the understanding that there would be brought about reciprocal switching arrangements with the Illinois Central which latter road was agreeable to this arrangement. (R. 186.) Officials of the railroad objected to making such reciprocal arrange-

ments and proposed, in lieu thereof, that there should be a switch track built connecting the mine with the Big Four track; and in July, 1919, a corps of railroad engineers, in co-operation with the engineer of the Coal Company, worked out on the ground a tentative switch track along practically the same route as the one which the Coal Company subsequently built. (R. 186.)

In the hope that reciprocal switching could be compelled and thus the expense of constructing the switch track might be avoided the Coal Company presented the matter to the Interstate Commerce Commission; but the Commission held that reciprocal switching could not be compulsorily ordered and dismissed the proceeding. (*Dering Mines Co.* v. *C. C. C. & St. L. Ry. Co.* 62 I. C. C. 265.)

Again the matter was taken up with officials of the railroad who advised, under date of November 1, 1921, as follows (R. 14, 118-119):

> **"If your Company cares to construct and maintain at your own expense a track from your mine up to our line, we will be glad to effect connection with such track, the point of connection of course to be designated by our Operating Department."**

Pursuant to the promise made in said letter the Coal Company (R. 188) promptly took steps to obtain options on a satisfactory right of way; and after acquiring such options a survey and plat were made and taken to the railroad offices in Cincinnati, where they were laid before the vice president and general manager for approval. (R. 189.)

The acquisition of fee title to this right of way cost the Coal Company about $33,000 (R. 188) and the cost of the completed track, including the right of way, exceeds $100,000. (R. 195.)

Having acquired the right of way it was necessary to

obtain an easement to cross the tracks of the Illinois Central (R. 97) and the Southern Illinois Railway and Power Company (R. 104) as well as the consent of the Commissioner of Highways. (R. 326.) These consents were obtained and the Illinois Commerce Commission (R. 325-331) approved the grant of such easements upon the condition that there be installed and maintained certain protections by it prescribed in its order entered May 3, 1923. (R. 325-331.)

Under date of May 8, 1923, the Illinois Commerce Commission entered an order (R. 331-336) requiring appellant to make the connection which is involved in this proceeding; but upon appeal to the Supreme Court of Illinois the Big Four was successful in its contention that the question whether this connection should or should not be made presented a matter wholly beyond the jurisdiction of the state authorities and was a question which was committed to the sole and exclusive jurisdiction of the Interstate Commerce Commission. This case is reported as *C. C. C. & St. L. Ry.* v. *Commerce Commission*, 315 Ill. 461, 146 N. E. Rep. 606; and the portion of such decision which is of materiality in this proceeding is as follows (315 Ill., p. 476):

> "Appellees also urge that under section 45 of the Public Utilities act they are entitled to this connection with appellant. That section provides as follows: 'Every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or receiver of freight, or of any corporation, person, or municipal corporation owning, operating or controlling any wharf or harbor facilities, for a connection between the railroad of such railroad company and any existing or contemplated track, tracks or railroad of such corporation, person or municipal corporation, shall make such connection and provide such switches and tracks as may be necessary for that purpose and deliver and receive cars thereover;

Provided, that such connection is reasonably practicable and can be installed and used without materially increasing the hazard of the operation of the railroad with which such connection is sought, and that the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company.' This section cannot be held to apply to situations coming under the Federal Transportation act. As to such the latter act is supreme. Nor can it be said that the legislature in enacting section 45 sought to confer on the Illinois Commerce Commission jurisdiction of those matters coming under the Federal Transportation act. The steam railways involved here are interstate carriers. That which amounts to an extension of their lines is under the sole jurisdiction of the Interstate Commerce Commission, and the Illinois Commerce Commission is without jurisdiction."

ARGUMENT.

Dering owns 3,670 acres of coal land in Saline County, Illinois. The Big Four owns approximately 39,000 acres of coal land in the same county which it leases to a mining company on a tonnage basis—by which is meant 2½ to 3c a ton royalty. (R. 305, 306.)

To secure the transportation facilities of the Big Four, and under assurances, oral and written, that such facilities would be given, Dering has expended $100,000 in acquiring title to a strip of land and laying railroad tracks thereon from its mine to the Big Four right of way, where connection with the Big Four will cost $2,000 and where (as found by the Commission, R. 128):

1. Interstate traffic has been tendered;
2. There will be sufficient business to justify the construction and maintenance of the proposed connection;
3. The proposed connection is reasonable, practicable and can be put in with safety;
4. It should be constructed and maintained by the Big Four.

In these circumstances Dering asserts and the Big Four denies that there is governmental power which can compel the carrier to provide for the 3,670 acres the same or similar transportation facilities which, as such carrier, it provides for the 39,000 acres of competitive coal owned by itself.

The Big Four defeated the exercise of state power by its claim in the Supreme Court of Illinois (315 Ill. 461, 476) that Congress had taken exclusive possession of the field and had committed the question here presented solely to the Interstate Commerce Commission.

The Big Four here endeavors to defeat the exercise

of federal power by its claim that the question here presented is "committed solely to the jurisdiction of the Illinois Commerce Commission and the courts of Illinois by paragraph 22 of Section 1 of the Interstate Commerce Act." (Brief, p. 12.)

Paragraph 9 of Section 1 of Title 49 of the United States Code herein above quoted, has been in force since the enactment of the Hepburn Act of June 29, 1906, and has been repeatedly and effectively enforced by the Interstate Commerce Commission. See *Winters Metallic Paint Co.* v. *C. M. & St. P. Ry. Co.* 16 I. C. C. 587; *Imperial Wheel Co.* v. *St. L. I. M. & S. Ry.* 20 I. C. C. 56; *Ridgewood Coal Co.* v. *Lehigh Valley R. R.* 21 I. C. C. 183; *Ralston Townsite Co.* v. *M. P. Ry. Co.* 22 I. C. C. 354; *John Montano* v. *P. C. C. & St. L. Ry.* 48 I. C. C. 728; *Virginia Coal and Fuel Co.* v. *N. & W. Ry.* 55 I. C. C. 61; *Schlicher* v. *Director General*, 62 I. C. C. 181.

Is there logical or plausible basis for appellant's contention that (Brief, p. 46):

> "Paragraphs 18-22, of section 402 of the Transportation Act have so amended and modified paragraph 9, or (G), of section 1, of an Act to Regulate Commerce, approved February 4, 1887, that the Interstate Commerce Commission has no jurisdiction to order a connection between an industrial or spur-track constructed to serve an industry and the railway of an interstate carrier, though said track be useful and used in the transportation of both interstate and intrastate commerce, and no jurisdiction to require such a track or such a connection to be maintained, used or operated in interstate commerce, and for that reason the orders of the Interstate Commerce Commission here involved are void"

or for appellant's contention that (Brief, pp. 47, 48):

> "The power, jurisdiction and authority of the Interstate Commerce Commission and the federal courts over the construction, maintenance and oper-

> ation of a connection with the proposed track is controlled by the proviso in Paragraph 22, Section 402 of the Transportation Act in relation to spur, industrial, team, switching and sidetracks located, or to be located, wholly within a single state"

or for appellant's contention that (Brief, p. 61):

> "Paragraph G (or 9) of Section 1 of the Interstate Commerce Act was modified by Paragraphs 18 to 22 of Section 402 of the Transportation Act and a new policy established by which side, spur and industrial tracks (wholly within a single state), were completely excluded from the jurisdiction of the Interstate Commerce Commission and committed to the jurisdiction of the several states, and if the track in controversy is a sidetrack within the meaning of said paragraph G (or 9) the Interstate Commerce Commission had no jurisdiction to require its connection, maintenance or disconnection, and if not, no jurisdiction was conferred by the petition or complaint filed herein."

We respectfully submit that there is no such basis; and that a mere reading of said paragraphs 18 to 22 will so demonstrate. Paragraphs 18 to 21 (U. S. Code Title 49, Section 1, paragraphs 18-21) conferred upon the Commission power and authority never possessed prior to the enactment of the Transportation Act of February 28, 1920. Such additional power and authority made public convenience and necessity (to be evidenced by certificate of the Commission issued after hearing) the norm by which to determine whether lines of railroad, or extensions thereof, might be constructed, acquired, or operated, or existing lines or portions thereof might be abandoned. Paragraph 22 then provided:

> "*The authority of the commission conferred by paragraphs* (18) *to* (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or sidetracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

As lucidly stated by a specially-constituted court in the case of *Southern Railway Co.* v. *Shealy*, 18 F. (2d) 784, at page 787:

> "The only limitation upon the jurisdiction of the Commission is set out in paragraph 22 of section 1, which, by its terms, *is made to relate only to the authority of the Commission conferred by paragraphs 18 to 21, both inclusive.*"

In *Alabama and Vicksburg Ry. Co.* v. *Jackson and Eastern Ry. Co.* 271 U. S. 244, this court said at page 250:

> "In matters relating to the construction, equipment, adaptation and use of interstate railroad lines, *with the exceptions specifically set forth in paragraph 22*, Congress has vested in the Commission the authority to find the facts and thereon to exercise the necessary judgment."

There is not involved in this proceeding any application by any railroad company to operate on any part of the Dering track, nor for permission to operate the track as an extension of any line of railroad or as a connecting railroad. As clearly stated in the report of the Commission (R. 133) on which the order herein is predicated:

> "We must assume that even though the contracts between complainant, the Illinois Central, and the traction company are sufficient to give to either of those carriers the right to handle traffic in interstate commerce over this track for the public generally, the fact remains that before either of those carriers could exercise such right it would be necessary to first obtain from us a certificate of public convenience and necessity, as provided in paragraph (18) of section 1 of the Interstate Commerce Act. We have issued no such certificate. It follows that as to interstate commerce no carrier has a right of operation over this track which would change its character from a private track to a public track."

The sworn answers of the Illinois Central (R. 150, 151) and of the Southern Illinois Railway and Power

Company (R. 160) deny that they were parties to the proceedings before the Interstate Commerce Commission which resulted in the order under attack, and affirmatively state that they have made no threat, at any time to connect their respective tracks with the rails of the Big Four or to bring about such connection, and specifically deny any such attempt or threat; and upon the bill and such sworn answers upon motion of the solicitor of the Big Four the bill herein was dismissed as to the defendants Illinois Central and the Railway and Power Company (R. 162).

Conclusion.

On January 23, 1924 (following more than six years of fruitless efforts to obtain Big Four service) Dering filed petition under paragraph 9 of Section 1 of the Interstate Commerce Act as amended. The Commission has found (R. 116-129; 130-133) and the record fully supports the findings that all the facts exist which are required by said paragraph 9 to entitle a shipper to the relief provided by said paragraph 9. Effective May 4, 1926 (R. 134) the shipper obtained said relief; and the specially-constituted court acted upon and applied the well-established rule (*U. S.* v. *New River Co.* 265 U. S. 533) that:

> "The authority conferred upon the Commerce Court by Sec. 207 of the Judicial Code was vested in the District Courts by the Act of October 22, 1913, and, like the authority previously exercised by the Federal Circuit Courts, is confined to determining whether the Commission's order violates the Constitution, or exceeds the power delegated by statute, or is an exercise of power so arbitrary as virtually to transcend the authority conferred. *Kansas City Southern Ry. Co.* v. *United States*, 231 U. S. 423, 439; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 483, 489. See also *Interstate Commerce Commision* v. *Illinois Central R. R. Co.* 215 U. S.

452, 470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.* 222 U. S. 541, 547; *Intermountain Rate Cases*, 234 U. S. 476, 490; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562." (540) * * *

"The courts will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its findings and conclusions. *Interstate Commerce Commission* v. *Illinois Central R. R. Co., supra*, 470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co., supra*, 547; *Kansas City Southern Ry. Co.* v. *United States, supra*, 456; *United States* v. *Louisville & Nashville R. R. Co.* 235 U. S. 314, 320; *Manufacturers Ry. Co.* v. *United States, supra*, 488." (542)

If Dering's rights under the federal statute could be in anywise dependent upon or affected by any provisions of the state law of Illinois, then the federal courts would be neither precluded nor excused from exercising their independent judgment concerning the proper interpretation of such state laws—inasmuch as Dering's rights under the federal statute had accrued and application for the enforcement of such rights had been made to the designated federal tribunal prior to the decision of the Supreme Court of Illinois. (See *Great Southern Fireproof Hotel Co.* v. *Jones*, 193 U. S. 532; *Kuhn* v. *Fairmont Coal Co.* 215 U. S. 349; *Brewer-Elliott Oil and Gas Co.* v. *United States*, 270 Fed. 100, and many federal cases assembled in Judge Sanborn's opinion at pages 103, 104.)

In the case of *Great Southern Fireproof Hotel Co.* v. *Jones*, 193 U. S. 532, it is shown that the Supreme Court of Ohio had held void as violative of the Ohio constitution a certain mechanic's lien law under the provisions whereof the plaintiff brought suit in the federal court subsequent to the decision of the Supreme Court of Ohio. Although the suit in the federal court was not begun until after the decision of the Ohio Supreme

Court, the contracts under which liens were claimed had been entered into prior to such decision. This court observing (p. 548) that:

> "The decision of the State Court, as to the constitutionality of the Statute in question, having been rendered after the rights of the parties to this suit had been fixed by their contracts, the Circuit Court would have been derelict in duty if it had not exercised its independent judgment touching the validity of the Statute here in question,"

held that the decision of the Ohio Supreme Court construing the Ohio Constitution was wrong and said (p. 550):

> "The great weight of authority in this country as to the meaning and scope of constitutional provisions substantially like those to be found in the Constitution of Ohio is, in our opinion, against the conclusion reached by the learned State Court. Exercising an independent judgment on the subject, we are obliged to so declare."

We respectfully submit, however, that the case at bar does not require or occasion consideration or decision of the correctness or incorrectness of anything *said* by the Supreme Court of Illinois in 315 Ill. 461. What the Supreme Court of Illinois *decided*, as we have heretofore pointed out, was that the question whether the Big Four should or should not make this track connection (p. 476):

> "is under the sole jurisdiction of the Interstate Commerce Commission, and the Illinois Commerce Commission is without jurisdiction"

By reason whereof (p. 478):

> "The orders of the Commerce Commission were void and the Circuit Court erred in affirming them."

To the frequently reiterated argument of appellant that the acquisition by Dering, in fee, of title to the 60-foot strip and the laying of railroad tracks thereon are "beyond the charter power of the Coal Company" (Brief, pp. 8, 52, 71, 74, 115, 116, 135-138) it would seem

to be a sufficient answer (entirely aside from the principle of equitable estoppel which should arise out of appellant's conduct in having induced, by its oral and written representations, the expenditure by appellee of over $100,000 for this property) to suggest that neither the Interstate Commerce Commission nor the courts which review its orders, nor the Big Four are interested in or concerned with this "*ultra vires*" question. As stated in *Kerfoot* v. *Farmers and Merchants Bank*, 218 U. S. 281, 287, quoting from *National Bank* v. *Matthews*, 98 U. S. 621:

> "Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. *Leazure* v. *Hillegas*, 7 Serg. & R. (Pa.) 313; *Goundie* v. *Northampton Water Co.* 7 Pa. St. 233; *Runyon* v. *Coster*, 14 Pet. 122; *The Banks* v. *Poitiaux*, 3 Rand. (Va.) 136; *McIndoe* v. *The City of St. Louis*, 10 Missouri, 575, 577. See also *Gold Mining Co.* v. *National Bank*, 96 U. S. 640."

It is respectfully submitted that the judgment of the court below should be affirmed.

JAMES M. SHEEAN,
CLARENCE B. CARDY,
Counsel for Appellee J. K. Dering Coal Company.

SUPREME COURT OF THE UNITED STATES.

No. 95.—October Term, 1927.

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Appellant,

vs.

United States of America et al.

On Appeal from the District Court of the United States for the Northern District of Illinois.

[January 3, 1928.]

Mr. Justice Brandeis delivered the opinion of the Court.

Paragraph 9 of § 1 of the Interstate Commerce Act as amended provides that "Any common carrier subject to the provisions of this Act, upon application of . . any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any . . private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same"; and it authorizes the Interstate Commerce Commission upon complaint and hearing to enforce performance of that duty. Act of June 29, 1906, c. 3591, § 1, 34 Stat. 584, 585; Act of June 18, 1910, c. 309, § 7, 36 Stat. 539, 547; Act of Feb. 28, 1920, c. 91, § 401, 41 Stat. 456, 475.

J. K. Dering Coal Company, which owns a large mine located on the Illinois Central Railroad, desired a direct connection also with the railroad commonly known as the Big Four. To this end, it built a private track, about three and a half miles long, from its mine to the right of way of the Big Four. Thereafter, it applied to the Interstate Commerce Commission, under paragraph 9 of § 1, for an order requiring the Big Four to construct, maintain and operate the desired switch connection. The mine, its track and the proposed connection are wholly within the State of Illinois. Upon full hearing, the Commission found the facts which, under

that paragraph, must exist before a shipper can require the railroad to construct a connection. That is, it found that the Coal Company had built its track up to the right of way of the railroad; that it had made application in writing for the connection; that it had tendered interstate traffic; that the business was sufficient to justify the construction and maintenance of the proposed connection; that the connection is reasonably practicable and can be put in with safety; and that the connection should be constructed and maintained by the railroad. Thereupon, the Commission entered the order prayed for. *J. K. Dering Coal Co.* v. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 96 I. C. C. 143; 109 I. C. C. 55.

The Big Four brought this suit against the United States and the Coal Company in the federal court for northern Illinois to set aside that order. The Commission intervened as defendant.[1] The case was heard before three judges upon motion for an interlocutory injunction, which was denied. Later, upon final hearing, a decree was entered dismissing the bill. That decree is here on appeal, under Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 220, and § 238 of the Judicial Code as amended by Act of February 13, 1925, c. 229, 43 Stat. 936, 938.

The District Court did not make findings of facts, render an opinion, or indicate by recital in the decree the grounds of its decision. The abridged record occupies 492 printed pages, besides numerous exhibits. There are 21 assignments of error. And the appellant's briefs fill more than 200 pages. No irregularity in the proceedings before the Commission is suggested. It is urged that some essential findings of fact made by the Commission are without support; but the evidence is clearly ample. The claim of invalidity is rested mainly upon contentions of an entirely different nature. These are numerous; and all are groundless. But, because they are peculiar in character and novel, they must be stated in detail.

First. It is contended that the power of the Commission, under paragraph 9, to require the construction of a switch connection with a side track built by a shipper and located wholly within one State,

[1] The Illinois Central Railroad Company and the Southern Illinois Railway and Power Company were also joined as defendants, but as to them the bill was dismissed, on motion of plaintiff, before entry of the decree under appeal.

was abrogated by paragraph 22, which was added to § 1 of the Interstate Commerce Act by Transportation Act, 1920. Act of February 28, 1920, c. 91, § 402, 41 Stat. 456, 478. Paragraph 22 declares: "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State. . . ."

Paragraph 22 in no way affects the power conferred by paragraph 9. By its terms, it operates as a limitation only upon the authority conferred upon the Commission in 1920 by paragraphs 18 to 21. These paragraphs relate to the construction, acquisition, extension and abandonment of a railroad. They deal primarily with rights sought to be exercised by the carrier. Compare *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 345; *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266; *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.*, 271 U. S. 244, 249. In denying their application to side tracks or spurs, paragraph 22 refers to tracks built by the carrier as a part of its railroad. Compare *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281, 285, 290. Paragraph 9, on the other hand, relates to switch connections with private sidings built by the shipper. The power to compel such had been granted to the Commission by the Act of June 29, 1906, c. 3591, § 1, 34 Stat. 584, 585. Furthermore, Congress gave explicit proof that in adding paragraph 22 to § 1, it meant to leave paragraph 9 unaffected. For Transportation Act, 1920, provided specifically that the paragraph concerning switch connections, which as it then stood was unnumbered, should (without change) be numbered 9. Act of February 28, 1920, c. 91, § 401, 41 Stat. 456, 475.

Second. It is contended that if the authority given the Commission by paragraph 9 was not abrogated by the enactment of paragraph 22, its exercise in the present case was subject to the requirements of paragraphs 18 to 21, and that the Commission's order is void for non-compliance therewith. The contention has two phases. In the first place, it is said that if the switch connection is made, the side track, by enabling the Big Four to reach into territory hitherto served wholly by another carrier, will become an

extension of its lines within the meaning of paragraph 18. Compare *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266; *Marion & Eastern R. R. Co.* v. *Missouri Pacific R. R. Co.*, 318 Ill. 436, certiorari denied, 271 U. S. 661. This argument proceeds from the same misconception of the purpose of paragraphs 18 to 21 as does the argument discussed above. These paragraphs deal with construction and abandonment on the part of the carrier, not with side tracks built by the shipper. Furthermore the order gave the Big Four no trackage rights over the Coal Company's track. The mere fact that a side track with which a connection is sought extends to an industry located on another railroad does not make the switch connection or the track of the shipper, or both combined, an extension of the railroad within the meaning of paragraphs 18 to 21.

The Big Four appears to place greater reliance on the other phase of the contention. The Coal Company's track crosses at grade, in addition to three highways, the tracks of the Illinois Central and the Southern Illinois. There is an agreement between these carriers and the Coal Company under which, by means of appropriate switch connections which it is physically possible to make, trains from these other lines could pass over the track, and thus, as is contended, tap territory now tributary to the Big Four. The argument is that because of the possibilities of the use of the track by these other carriers, it is an extension within the meaning of paragraph 18. *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, *supra*. But no such connection has been made or attempted or threatened; and neither the Illinois Commerce Commission nor the Interstate Commerce Commission has authorized such connection or use. If the track is used by the Illinois Central or the Southern Illinois in the manner described, paragraph 20 of § 1 furnishes the appellant with an appropriate remedy. *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, *supra*.

Third. It is contended that, regardless of the fact that the order of the Commission provides only for a switch connection with the siding of the Coal Company, the siding must be regarded as an extension within the meaning of paragraphs 18 to 21, because under the law of Illinois, all tracks which cross highways are deemed public tracks, and this track crosses highways. It is true that,

under § 45 of the Public Utilities Act of the State, Cahill's Illinois Revised Statutes (1925), Chap. 111a, par. 60, a switch track, though built by an industry and used in connection with it, is a part of the railroad subject to public use. *Public Utilities Commission* v. *Smith*, 298 Ill. 151; *St. Louis, Springfield & Peoria R. R.* v. *Commerce Commission*, 309 Ill. 621. But, obviously, a State cannot, in respect to the regulation of interstate commerce, override the will of Congress. *Napier* v. *Atlantic Coast Line*, 272 U. S. 605. The Commission was given the authority to compel an interstate carrier to construct a switch connection with a side track built by an industry. The State cannot curtail the Commission's power over interstate commerce by denying it authority to compel a connection with such a side track unless the circumstances are such that public necessity and convenience require an extension of the railroad under paragraphs 18 to 21. Compare *Colorado* v. *United States*, 271 U. S. 153; *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.*, 271 U. S. 244. As the Commission said, when making the order: "We, of course, are not concerned with the character of the track with respect to intrastate commerce." 109 I. C. C. 55, 57.

Fourth. It is contended that the Coal Company is estopped by certain proceedings in the state courts from denying that the track from the mine to the right of way of the Big Four is an extension, within the meaning of paragraphs 18 to 21. The facts relied upon, so far as material, are these. In 1922, the Coal Company applied to the Illinois Commerce Commission for leave to build this track, and later prayed that its use be limited to a private minelead track. The Big Four challenged the Commission's jurisdiction, on the ground that the proceeding was one to compel the connection or extension of interstate carriers and was within the exclusive control of the Interstate Commerce Commission. The Illinois Commerce Commission overruled the challenge, found for the petitioners on the merits, and, at their request, provided in its orders that the track when built and connected with the Big Four should not be used for any other purpose than to serve the mine of the Coal Company, until permission for further use should be granted by the Illinois Commission. Thereupon, the Big Four assailed the orders of the state commission in the circuit court for Saline County and was

defeated there. After the validity of the orders had been affirmed by that court the track was constructed. Later, the Supreme Court of the State, reviewing the circuit court's decision, held the order of the state commission void, on the ground, urged by the Big Four, that, in spite of the limitation in the orders, the track would be, under the law of Illinois, a public track, and, hence an extension of the railroads within the meaning of paragraphs 18 to 21; and that since the carrier was engaged in interstate commerce, the jurisdiction to compel construction of the switch vested in the Interstate Commerce Commission, *C., C., C. & St. L. Ry. Co* v. *Commerce Commission*, 315 Ill. 461, 476. That court said:

"This section [45 of the State Utilities Act] cannot be held to apply to situations coming under the Federal Transportation act. As to such the latter act is supreme. Nor can it be said that the legislature in enacting section 45 sought to confer on the Illinois Commerce Commission jurisdiction of those matters coming under the Federal Transportation act. The steam railways involved here are interstate carriers. That which amounts to an extension of their lines is under the sole jurisdiction of the Interstate Commerce Commission, and the Illinois Commerce Commission is without jurisdiction."

The Big Four, having, thus, convinced the state court that the order of the state commission was void because the matter is one within the jurisdiction of the federal commission, insists now that the latter cannot act because of the state decision. The judgment of the highest court of the State is, of course, conclusive in so far as it declares that the state commission exceeded its statutory powers. But, obviously, neither the legislature nor the courts of a State can limit the power of the Interstate Commerce Commission to compel connections with private side tracks. The declaration of the state court that the track which the federal authority determines is private, shall be deemed public, can not affect the validity of the order of the Interstate Commerce Commission. If it could, construction by the railroad of the switch connection with the shipper's track would not be compellable under either state or federal law. Compare *United States* v. *New York Central R. R. Co.*, 272 U. S. 457, 459.

Fifth. It is contended that the Coal Company is not, within the meaning of paragraph 9, a "shipper" on the Big Four, because its mine was already connected with the Illinois Central. The ar-

gument is that Congress did not intend to give a shipper the right to a direct connection with more than one railroad. There is nothing in the Interstate Commerce Act which justifies such a limitation of the general language of paragraph 9. Coal mines are often connected with more than one railroad. Compare *United States* v. *New River Co.*, 265 U. S. 533; *In re Irregularities in Mine Ratings*, 25 I. C. C. 286, 287; *Dering Mines Co.* v. *Director General*, 62 I. C. C. 265; *Fairmont & Cleveland Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 62 I. C. C. 269; *Bell & Zoller Coal Co.* v. *Baltimore & Ohio Southwestern R. R. Co.*, 74 I. C. C. 433.

Sixth. It is contended that the Coal Company is not a shipper on the Big Four, within the meaning of paragraph 9, because up to the time of the application to the Commission it had not actually shipped coal by this route over the Big Four. The argument is that no one, unless he is already a shipper at the time of the application to the Commission, is entitled to a switch connection. Congress imposed no such limitation. It safeguarded the expenditures of the carrier by other provisions. It limited the railroad's obligation to the building of the switch connection, leaving the burden of building the side track upon the shipper. *Winters Metallic Paint Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 16 I. C. C. 587; *Ralston Townsite Co.* v. *Missouri Pacific Ry. Co.*, 22 I. C. C. 354; *National Industrial Traffic League* v. *Aberdeen & Rockfish R. R. Co.*, 61 I. C. C. 120, 121; *Certain-Teed Products Co.* v. *Chicago, R. I. & Pac. Ry. Co.*, 68 I. C. C. 260, 263. And the railroad cannot be ordered to build the switch until after the shipper has built the private siding. *Virginia Coal & Fuel Co.* v. *Norfolk & Western Ry. Co.*, 55 I. C. C. 61; *Schlicher* v. *Director General*, 62 I. C. C. 181, 186.

Seventh. It is contended that the Coal Company is not a shipper on the Big Four, within the meaning of paragraph 9, because the railroad can be compelled to build the connection only with a "private side track which may be constructed to connect with its railroad", and the track of the Coal Company, if a private track, could not be legally constructed. The argument is that, under the law of Illinois, only a public track may cross a highway; that an Illinois mining corporation has no power to build a public track; that since the Coal Company is an Illinois corporation the construction of the track was *ultra vires;* that hence, whether the

track be public or private, it is an illegal structure; and that consequently it is not a track "which may be constructed" within the meaning of paragraph 9. Congress obviously did not impose upon the Interstate Commerce Commission the duty of determining, before issuing an order, whether or not a private track actually in existence had been constructed by the shipper *ultra vires*. Whether in so acting, the shipper transgressed powers conferred upon it by the State is a question which cannot be raised in this suit. If the State concludes to question the legality of the shipper's acts, it must do so in a direct proceeding instituted by it for that purpose, *Kerfoot* v. *Farmers & Merchants Bank*, 218 U. S. 281, 287.

Thus, all the contentions of the Big Four are clearly unfounded. The District Court properly refused to grant a stay of the Commission's order pending an appeal. It is difficult to believe that the appeal would have been persisted in, if that court had delivered an opinion setting forth its reasons for dismissing the bill. Where the trial court omits to state the grounds of its decision, the appellate court is denied an important aid in the consideration of the case; and the defeated party is often unable to determine whether the case presents a question worthy of consideration by the appellate court. Thus, both the litigants and this Court are subjected to unnecessary labor. *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 675. See also *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 274 U. S. 588; *Arkansas Railroad Commission* v. *Chicago, Rock Island & Pacific R. R. Co.*, 274 U. S. 597; *City of Hammond* v. *Schoppi Bus Line*, 275 U. S. —; *City of Hammond* v. *Farina Bus Line & Transportation Co.*, 275 U. S. —.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.